Office-Supreme Court, U.S.
FILED
AUG 7 1982
ALEXANDER L. STEVAS,
CLERK

82-230

In The

SUPREME COURT of the UNITED STATES

October Term, 1982

WAYNE POMANOWSKI,

Petitioner,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, a New Jersey Corporation; Monmouth County Multiple Listing Service; New Jersey Association of Realtors; National Association of Realtors; William G. Kircher; Charles Darrah,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

I.

Can a state licensed real estate broker be barred from interstate and intrastate commerce by reason of his refusal to join the trade association that controls such commerce?

II.

May a State deviate from Federal law in an Antitrust matter that affects interstate commerce, where that State's law assures litigants by statute and court decisions that State Antitrust law will be interpreted in harmony with the Sherman Antitrust Act?

III.

When the New Jersey Supreme Court mandates that all licensed real estate brokers must join a trade association as a prerequisite to practicing their profession, has the Court not violated the petitioner's constitutional right of nonassociation, which is protected by the First and Fourteenth Amendments?

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OPINIONS BELOW

The opinion of the New Jersey Supreme Court, on certiorari to the trial court, reversing the judgment for the petitioner was decided May 10, 1982 and it appears at App. 1.

The opinion of the Superior Court, Chancery Division, rendered June 11, 1980 is reported at 175 N.J. Super 212 and appears at App. 32.

The Denial of Petition for Certification and Cross Petition for Certification was decided on May 1, 1979 and reported at 81 N.J. 260.

The opinion of Superior Court, Appellate Division, reversing the granting of summary judgment to petitioner and remanding to the Superior Court, Chancery Division,

rendered February 21, 1979 is reported at 166 N.J. Super. 269 and appears at App. 47.

Opinion of the Superior Court, Chancery Division, granting petitioner's Motion for Summary Judgment, decided July 19, 1977, reported at 152 N.J. Super. 100, reproduced at App. 54.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1257 (3):
the Supreme Court of New Jersey rendered its decision on May 10, 1982 (App. 1) and this Petition for Writ of Certiorari is timely filed thereafter.

CONSTITUTIONAL PROVISION INVOLVED

This case involved the Commerce Clause of the United States Constitution which

provides as follows:

> The Congress shall have power
> "To regulate commerce ...
> among the several states..."
> Sec. 8

This case also involves the Fourteenth Amendment to the Constitution, freedom of nonassociation:

> "....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

FEDERAL STATUTES INVOLVED

This case involves the Sherman Antitrust Act 15 USC 1 et seq., the pertinent portions of which are reproduced at App. 70.

STATE STATUTES INVOLVED

This case involved the New Jersey Antitrust Act which Act specifically provides that the State Act is patterned after the Federal Act and must be interpreted in conformance with the Sherman Act and Federal Court decisions. The State Act is found at N.J.S. 56:9-1, et seq and is reproduced at App. 67.

STATEMENT

Petitioner, Pomanowski, is a New Jersey licensed real estate broker.

Respondent Monmouth County Multiple Listing Service (MCMLS) is a committee of the Monmouth County Board of Realtors (MCBR).

The Monmouth County Multiple Listing Service places the listings of each participating broker in the hands of all brokers in the area who are also participants in the service. App. 36

The trial judge found that the MCMLS " . . controls at least 50% of the residential real estate business of the County." App. 39

The trial judge further found that 84% of the brokerage firms in the County were controlled by MCMLS. App.

Pursuant to the Rules of the MCBR and the New Jersey Association of Realtors and the National Association of Realtors, a broker is denied access to the Multiple Listing Service unless he is a member of the aforementioned three organizations.

The petitioner resigned from the Monmouth County Board of Realtors, the

New Jersey Association of Realtors and National Association of Realtors and was immediately denied access to the Monmouth County Multiple Listing Service.

Petitioner could not compete, his sales force left his office, and Petitioner could no longer make a living. App. 74

This suit was instituted claiming that conditioning participation in the Monmouth County Multiple Listing Service upon membership in the Monmouth County Board of Realtors, the New Jersey Association of Realtors and the National Association of Realtors was a violation of the New Jersey Antitrust Act in that the Defendants had restrained trade and conspired to restrain and monopolize trade.

The trial judge granted Summary Judgement for Petitioner. App. 54

The Appellate Division reversed and remanded, agreeing with the trial judge that the "rule of reason" was the applicable law (App 50) but remanded for a plenary hearing. App. 53

At the lengthy plenary hearing Plaintiff presented testimony that the MCMLS controlled at least 50% of the applicable market.

Brokers in Monmouth County are involved in interstate commerce as evidenced by their affiliations with various nationwide real estate franchises whose purpose is to refer customers from state to state.

The trial judge found that the Petitioner's denial of access to the Monmouth County Multiple Listing Service violated the New Jersey Antitrust Act and entered judgment in favor of Petitioner.

The New Jersey Supreme Court granted direct certification (87 N.J. 426 (1981).

The Supreme Court held that "Absent any showing of a true denial of access, the defendants should not be required to dismantle or significantly alter a trade association that provides procompetitive benefits in excess of any anticompetitive effects engendered. Accordingly, we conclude that in conditioning MCMLS access on MCBR membership, defendants have created a reasonable restraint of trade -- one not in violation of our Antitrust Act." App. 28

The New Jersey Antitrust Act is patterned after the Sherman Antitrust Act (15 USC 31 et seq).

The New Jersey legislature specifically provided that "This act shall be construed in harmony with judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it." NJS 56:9-18. App. 67

The petitioner had every reason to believe that his rights would be protected equally under the New Jersey Antitrust Act and the Sherman Antitrust Act. As a result of this statutorily based reliance, Petitioner chose the State of New Jersey as his forum. The Supreme Court of New Jersey has denied him those rights.

ARGUMENT

I.

THE NEW JERSEY SUPREME COURT HAS EXCLUDED A NEW JERSEY LICENSED REAL ESTATE BROKER FROM INTERSTATE AND INTRASTATE COMMERCE BECAUSE OF HIS REFUSAL TO JOIN A TRADE ASSOCIATION.

The matter before the Court, although it appears to be only the ruling of one State Supreme Court, has far reaching implications in a national trend of antitrust thought. If such a trend continues, every licensed real estate broker in every state may have to hold membership in the local, State and National Realtor trade organizations, or face exclusion from the intrastate and interstate commerce of their profession.

The New Jersey Supreme Court, under the "rule of reason", decided, based on incorrect figures chosen by the court below, that the pro-competitive benefits of Realtor Board sponsorship of the Monmouth County Mulitple Listing Service out-weighed the negative restraint of excluding this class of State licensed non trade association members from the Multiple Listing Service (M.L.S.) This decision, in effect, establishes the Realtors as the lawful licensing and regulatory authority, challenging the Federal right of Congress to regulate such interstate commerce and stands foursquare against half a century of prevailing Federal court opinions.

This is not an issue of only one county. The Realtors control and preclude non Realtors in 27 of the state's 35 Multiple Listing Services.

We contend this movement to exclude all non trade association members from intrastate and interstate commerce is part of a nationwide plan.

In the national public interest, the U.S. Supreme Court should examine the trade association's growing control over the real estate industry and the negative effects on competition of such Realtor control.

A Realtor and a licensed real estate broker are not synonomous terms. A Realtor is a licensed real estate broker who subscribes to a national code of ethics, and is a member in good standing of the local, state and national trade associations.

If a licensee meets all of the previously mentioned qualifications, the National Association of Realtors will allow the broker to display the word "Realtor" in conjunction with his name or the firm name. All real estate brokers are not Realtors.

Wayne C. Pomanowski, the petitioner, is one member of this class of duly licensed brokers nationwide, who does not maintain trade association status. The penalty imposed on the petitioner for this non association has been exclusion from the intrastate and interstate commerce in the real estate industry. The Monmouth County Board of Realtors (M.C.B.R.) owning the subsidiary Committee, Monmouth County Multiple Listing Service (M.C.M.L.S.), is one of the state's

largest multiple listing services having in 1977 260 Realtor members (brokers). App. 38

In 1978, the M.C.M.L.S. had a residential sales volume of $262,571,872.24, processing 10,373 residential listings.

The New Jersey Attorney General testified that the Realtors controlled 70% of the market of residential listings. App. 37

The trial judge concluded that the M.C.B.R., through M.C.M.L.S., controls a not insubstantial segment of the real estate market in Monmouth County. App.

The denying of petitioner of access to M.C.M.L.S. has the effect of petitioner foreclosing his ability to successfully compete in the real estate business. App. 74

Moreover, the proposed justification for the exclusion rule being the amount of support given to M.C.M.L.S. by the M.C.B.R., New Jersey Association of Realtors and National Association of Realtors does not outweigh the damage to the petitioner in that Realtor membership is totally unrelated to the operation of M.C.M.L.S.

II.

THIS COURT SHOULD GIVE DIRECTION TO A STATE COURT OF LAST RESORT WHERE THE STATE COURT FAILS TO CORRECTLY APPLY PREVAILING FEDERAL OPINIONS TO ITS STATE LAW.

"This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practical, a uniformity in the laws of

those states which enact it."

New Jersey Antitrust Act N.J.S. 56:9-18.

The New Jersey Legislature, while using the Sherman Antitrust Act as a model, recognized it could not preempt Federal law. The respondent in this matter will, no doubt, contend this is a state statute decided in a state court, with no Federal issue present.

However seemingly meritorious this argument may be, the purpose of that ancillary statute is clear. When any state court decisions create a conflict with Federal case law covering identical statutes, then such state decisions stand as a challenge to the Federal authority.

The New Jersey Supreme Court has affirmed their obligation to test antitrust issues not only under the State Antitrust Act, but also under the Sherman Antitrust Act. State of New Jersey v. Lawn King, 84 N.J. 179 (1980).

In determining the jurisdictional question in this matter, the court can be guided by Orr v. Orr 99 S.Ct. 1102 (1979) and Delaware v. Prouse 99 S.Ct. 1391 (1979). This court held that where a state court does not decide against an appellant on an independent state ground, but deeming the federal question to be before it, actually decides that question adversely to the federal right asserted, the Supreme Court has jurisdiction to review the judgment if it is final.

In Delaware, id., this Court held that if the judgment is a final judgment, this Court cannot refuse jurisdiction because the state court might have based its decision upon an independent and adequate non federal ground.

In the Pomanowski decision, the court below does not deny such federal issues are present, speaking often of their legislative mandate to be in harmony with federal decisions and utilizing several federal citations. Stating in their search for Federal opinion that the U.S. Supreme Court has "rendered no decision directly on point", the N.J. Court rested its decision on State of Iowa v. Cedar Rapids Board of Realtors 300 NW 2d 2d 127 (1981) which is not in harmony

with prevailing Federal opinion.

The State Attorney General in Cedar Rapids, op. cit., failed to show the Realtors' monopoly of the relevant market, showing only a 10.4% control of the market, the State further admitted that there was extensive cooperation between M.L.S. members and non M.L.S. members. The Iowa Competition Act is also patterned after the Sherman Act along with its ancillary statute requiring harmony with interpretation of Federal statutes. The Iowa case is clearly distinguishable from the case at bar.

The petitioner contends this matter is properly before the Supreme Court for review. The petitioner's right to have Federal opinion prevail is statutory. Zacchini v. Scripps-Howard Broadcasting Co. 97 S.Ct. 2849 (1977) held that where a

state court is guided by Federal interpretation of parallel Federal laws in interpreting its own state law and fails to properly understand such Federal consideration, this Court has jurisdiction to correct such errors.

Where, as here, such harmony is lacking and there is need of Federal interpretation, a petitioner may only turn to the United States Supreme Court for a remedy. If such interpretation by the New Jersey Supreme Court is incorrect, then this Court should give proper direction to the New Jersey Court.

Adding to the seriousness of the lower court decision is this Court's recent opinion in McLain v. Real Estate Board of New Orleans 100 S.Ct. 502 (1980). The Supreme Court held that real estate brokers are involved in

the interstate commerce process. In McLain this Court concluded that one Board of Realtors was involved in interstate commerce.

In the case at bar the record below will reveal that the exclusion of non Realtors existed in 27 of New Jersey's 35 multiple listing services. One must inescapably conclude that with 75% control of the M.L.S. in the State of New Jersey, interstate commerce is affected. Can one possibly conclude that in all of these Raltor controlled transactions within these Realtor controlled M.L.S. not one person sold his house to move to another state; not one title company did business in another state; not one bank had multi-state affiliations? The MCMLS sales volume for this one listing service for one year was in excess of

one quarter of one billion dollars.

Where a state court is guided by Federal interpretations of parallel Federal laws in interpreting its own state law and fails to properly understand such Federal considerations, the U.S. Supreme Court has jurisdiction to correct such errors.

III.

THE DECISION BELOW VIOLATES PETITIONER'S FIRST AND FOURTEENTH AMENDMENT RIGHTS ON NONASSOCIATION.

The court below is bound by its own Act to follow Federal interpretation.

The record below will indicate that the petitioner raised the issue of his constitutional right of freedom of association or, in this case, freedom of nonassociation, protected by the First and Fourteenth Amendments. Although neither the State Appellate Division of the Superior Court nor the trial judge ruled on the merits of the freedom of

association issue, it was raised at the initial trial and appellate level by the petitioner and the Amicus Curiae Attorney General, in Pomanowski v. Mon. Cty. Bd. of Realtors 166 N.J. Super. (1979).

At the heart of the matter is the petitioner's constitutional right to associate or not associate with the Realtor's trade organization, protected by the First and Fourteenth Amendments. There is something fundamentally wrong with a system of justice that compels, absent any affirmative legislative mandate, an individual to belong to or pay dues into an association that he does not choose to join of his own free will.

Speaking clearly for the U.S. Supreme Court in Abood v. Detroit Board of Education

431 U.S. 209, 52 L.Ed. 2d 261, 97 S. Ct. 1782 at page 283, 52 L. Ed. 2d Justice Stewart stated "Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed to him by the First Amendment, as a condition of public employment."

What the N.J. Supreme Court has said is that if petitioner wishes to to participate in the intrastate and interstate commerce of his chosen profession, which is clearly controlled by the Realtors, then he must be forced to sacrifice his constitutional right of freedom of association or, in this matter, freedom of nonassociation. Without access to such commerce the petitioner is clearly without employment.

The MLS which, now by court ruling, lawfully controls the free enterprise system is not open to all.

In Abood the statute provided for the constitutional right of nonassociation in that if Abood did not want to join the local union he didn't have to wear the union label. However, he would to pay for the economic benefit he derived from their representation of him during contract negotiations.

There is no such status with the Realtor organization. Either you wear the "R" label or you are effectively unemployed.

IV.

A TRADE ASSOCIATION THAT HAS GAINED CONTROL OF THE MARKETPLACE SHOULD NOT BE GRANTED THE POWER TO EXCLUDE OTHERS FROM THAT MARKETPLACE.

There is no other profession in our society where you must be a member of a trade association to participate in any part of our free enterprise system. Established Federal law is to the contrary. Why should the Realtors enjoy this constitutional immunity?

Participation in commerce should not be a benefit for an elite trade group when the Realtors have such dominant market power. Provisions must be made for other equally worthy participants in our free enterprise system.

Multiple listing is our country's current vehicle for residential real estate commerce. The days of the small independent real estate broker, loosely cooperating with other independent brokers with their small supply of listings, are over. M.L.S. is a multi-million dollar

industry involving millions of home sellers, and tens of thousands of licensed real estate brokers involved in a nationwide network of national franchises and multiple listing services. In response to petitioner's voluntary resignation from the Realtors, the court failed to place proper weight on the fact that the petitioner was given a join or be excluded" ultimatum by the MCMLS.

The New Jersey Supreme Court spoke often of the supposed procompetitive benefits that flow from Realtor sponsorship. However, the high court never once spoke of the negative effects that occur when licensed brokers are foreclosed from the market. Therefore, the public's choice of a broker is severely constricted.

The court below has held that this intrastate and interstate commerce is

solely a benefit for Realtors, and that non-Realtors who are state licensed, as fully competent and qualified to serve the public, are not worthy of participation in the uniquely American process of buying and selling houses. Not only are brokers from New Jersey excluded, but also out of state brokers, who have complied with New Jersey's reciprocal licensing laws, and who have legitimate business needs in the New Jersey marketplace.

Recently in People of California v. National Association of Realtors, the State Supreme Court agreed with U.S. vs. Realty Multi-List, Inc., 629 F 2d 1351 (Fifth Circuit, 1980), holding that MLS may not impose the added burden of Realtors dues on licensees. From this disharmony of opinion comes a harmonious plea for a

national antitrust policy on MLS. The court below erred when it held that because the Realtors have worked long and hard to develop a monopoly, they now should be privileged to enjoy their dominant market position of monopoly.

If the holding by the New Jersey Supreme Court is valid, that Realtor sponsorship of MLS is procompetitive, how can an independent MLS survive and even operate at a substantially lower cost than Realtor controlled Boards?

The obvious conclusion is that Realtor dues, paid to local, state and national Realtor organizations, amount to a private tax on the willing and not so willing participants in this network of Realtor controlled MLS' for the sole purpose of increasing the power of such trade associations.

The testimony of Respondent, New Jersey

Association of Realtors', Executive Officer, Robert Ferguson, was that the Realtors' purpose in gaining this tremendous market control over the industry was only to increase membership in the Realtor group.

IV.

THE NEW JERSEY SUPREME COURT ERRED IN ITS BALANCING OF THE NEGATIVE EFFECTS OF RESTRAINT OF TRADE AND THE PRO-COMPETITIVE BENEFITS THAT FLOW FROM REALTOR CONTROLLED MULTIPLE LISTING SERVICES.

In framing their novel approach to antitrust law the N.J. Supreme Court listed several benefits flowing from Realtor affiliation that made the exclusion of petitioner reasonable:

1. Realtor affiliation assures the public of propriety in dealing

with a Realtor controlled M.L.S.

2. Code of ethics
3. Imposes sanctions upon delinquent members
4. Provides facilities for arbitration of disputes and resolution of ethics complaints.
5. Realtors volunteer hours
6. Realtors share some space with M.L.S.

(App. 18-20)

As to the use of the word "Realtor" to assure the public of propriety, the public, and most learned professionals don't even know the difference between a Realtor and a licensed real estate broker.

The code of ethics is completely covered and preempted by the New Jersey License Law.

Non Realtors are governed by an even stricter ethical conduct.

Although the court alluded to the sanctions issue, the trial record is barren as to anyone ever being cast out of the Realtors.

As to the volunteer hours, the Realtors' expert testified that he had no proof that the volunteer hours made the Realtor controlled M.L.S. any better than an independent M.L.S.

The court was silent on the counter-balancing evils that would occur if all licensed brokers could participate in the MCMLS, and silent further on explaining the damage that occurred due to the effective de-licensing of the petitioner and other non-Realtors licensed to do business in New Jersey.

For each dollar the petitioner had to pay in 1977 to gain access to MLS, he had to pay 68¢ into the Realtors' treasury. When one adds the cost of trade association dues for the two sales associates, for each dollar petitioner paid into MLS he would have to pay $1.00 into the Realtors' trade group treasury.

This means for the year 1977 Pomanowski paid over and above the cost of his MLS fee, an additional 100% fee for trade association dues, so as not to be excluded from the commerce of his industry. If he were a large statewide broker with many offices, he would have to pay county dues in any of New Jersey's 21 counties he did business. If he had a large office with many agents he could easily pay 300%, 400% or even 500% more in trade dues than the

cost of the essential MLS.

The effect on part time agents is devastating.

If a large interstate public utility, transmitting energy, refused to sell any power to purchasers, unless these purchasers first agreed to pay a surcharge to the utility trade association equal to 100% of the cost of the power purchased, would the court not sit up in shock at such outrageous conduct. This conduct has been affirmed by the N.J. Supreme Court.

The New Jersey Administrative Code specifically provides at NJAC 11:15-1.23 (c) "Every licensee shall fully cooperate with any other New Jersey licensee, utilizing his customary cooperation arrangements which shall protect and promote the interest of the

licensee's client or principal and which shall not constitute unreasonable practice within the real estate brokerage business...." (emp. added)

The laws of the State of New Jersey mandate this inter-broker cooperation. In spite of this mandate, the court below now sanctions exclusion of non member licensees from access to the MCMLS.

United States v. Realty Multi-Listing, 629 F.2d 1351 (5th Cir. 1980) beyond being the controlling Federal case on extra licensing requirements is also a treatise on the competitive harm of exclusion. Justice Goldberg, with absolute clarity stated, that when such exclusion occurs, both the broker and the public are harmed. Most

importantly, where an MLS creates barriers to entry, beyond the state's regulatory authority, the MLS must make showing that the legitimate needs of MLS require protection in excess of that provided by the state.

The court below accomplished this by some judicially startling fact finding.

The court below used incorrect figures to justify its pivotal conclusion that the Realtor controlled MLS is better. App. 20. Even more judicially shocking is the fact that the court below, now assuming the position of fact finder totally excluded similar testimony dealing with cost efficiency of Realtor Boards. A schedule of correct figures follows.

Pomanowski re-hearing February, 1980	Mon.Cty. M.L.S.	M.L.S. of No. N. J.	Middlesex Cty. M.L.S.
Is MLS a Committee of a Bd. of Realtors ?	yes	no	yes
Is Realtor membership a prerequisite to Joining the MLS?	yes	no	no
Cost of Initiation Fee to MLS	$500.00 [1]	$1300.00 [4]	$500.00
Cost of Realtor Dues for Broker	$200.00 [2]	none	$300.00
Cost of Yearly Broker Dues to MLS	$300.00	$308.00	$480.00
Total Cost to Compete	$520.00	$308.00	$780.00
Number of Counties Covered	[3] One	[5] Six	[7] Three
Cost to Compete per County	$520.00	$ 51.33	$260.00
Cost to Process each Listing	$25.00	$25.00	$25.00

FOOTNOTES

1. The N.J. Supreme Court erred in its fact finding grabbing the erroneous figure of $250. as an entrance fee. This $250. was Pomanowski's Realtor dues in 1977, which are not part of the re-hearing. The correct figure was $500. This $500. fee is also not refundable.

2. This is the correct 1980 cost for a licensed broker to become a "Realtor" in Monmouth County, N.J. The Supreme Court again erred in its fact finding.

3. Monmouth County

4. This fee is 100% refundable depending on your time with the MLS Service.

5. Passaic, Bergen. Warren, Sussex, Essex, Morris

6. The Supreme Court in its fact finding chose to ignore and compare the testimony and facts presented in the re-hearing of Rudolph Grillo, President of Middlesex County Board of Realtors.

7. Union, Middlesex, Somerset

In U. S. v. Topco Associates 92 S. Ct. 1120 405 U.S. 596 31 L.Ed.2d 515 (1972) Mr. Justice Marshall spoke clearly on the prevailing Federal opinion regarding exclusion of American citizens from the free enterprise system. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete - to assert with vigor, imgination, devotion, and ingenuity whatever economic muscle it can muster.

Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." Cf. United States v. Philadelphia National Bank 374 U.S. 321, 371, 83 S.Ct. 1715 1745, 10 L.Ed. 2d 915 (1963)

The opinion in U.S. v. Topco Associates, op. cit. personifies the seriousness with which the U.S. Supreme Court views any effrontery to an entrepreneur's guaranteed right to participate in the commerce of his chosen profession.

Any restraint such as in the case at bar which denies such guarantee must be

subjected to probing examination, and if such restraint of the individual's basic freedom is not overwhelmingly outweighed by a multitude of benefits to competition, the restraint must fail. U.S. v. Realty Multi-List, Inc. ¢@(F.2d 1351 (5th Cir. 1980)

In National Society of Professional Engineers v. U.S. 98 S.Ct. 1355 (1978), this court adhered to the position that the inquiry mandated by the "Rule of Reason" is whether the challenged agreement is one that promotes competition or one that suppresses competition. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition

(38 S. Ct. 243, 97 S. Ct. 2557).

In Silver v. N.Y. Stock Exchange 83 S. Ct.1246 (1963) Mr. Justice Goldberg speaking clearly for the court stated that "antitrust laws serve, among other things, to protect competitive freedom, freedom of individual business units to compete unhindered by the group action of others."

The case at bar is analogous to Silver in that non members were excluded from information that gave them the ability to compete with members. The U.S. Supreme Court rejected this group boycott of non members.

CONCLUSION

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari be granted.

Petitioner hereby reserves his right to demand counsel fees and costs below and in this Court.

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APPENDIX

IN THE SUPREME COURT OF NEW NERSEY, WAYNE C. POMANOWSKI, PLAINTIFF-RESPONDENT, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION, AND MONMOUTH COUNTY MULTIPLE LISTING SERVICE, DEFENDANTS-APPELLANTS, AND NEW JERSEY ASSOCIATION OF REALTORS, NATIONAL ASSOCIATION OF REALTORS, WILLIAM G. KIRCHER, AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERED BY CLIFFORD, J.

Defendant Monmouth County Board of Realtors (MCBR or the Board) is a trade association affiliated with defendants New Jersey Association of Realtors and National Association of Realtors ®[1]. MCBR makes available to its members the Monmouth County Multiple Listing Service (MCMLS), which operates as a committee of the Board. A by-law of the MCBR requires that as a precondition to access to MCMLS, a real estate broker be a member of the Board. The principal issue is whether

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[1] The term "Realtor" is a registered mark of the National Association of Realtors, used to refer only to members of the Realtor trade association. The National Association licenses state and local Boards to use this mark.

that arrangement constitutes a violation of the New Jersey Antitrust Act, N.J.S.A. 56:9-1 to -19, as held by the court below, Pomanowski v. Monmouth County Board of Realtors, 175 N.J. Super. 212 (Ch. Div. 1980). We hold to the contrary and hence reverse.

I

Plaintiff, Wayne Pomanowski, a licensed real estate broker, operates the Thompson Agency in Tinton Falls, Monmouth County. From 1972 until 1977 plaintiff was a member of both MCBR and MCMLS and had access to the multiple listing service as a member of the Board. In April 1977 plaintiff terminated his membership in the Board by not paying dues for himself and his salespeople. He was thereupon denied participation in MCMLS.[2]

Shortly thereafter, plaintiff commenced this suit against MCBR; MCMLS; the National

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[2] Although plaintiff stopped paying his MCMLS dues as well, defendants concede that failure to pay MCBR dues would alone have precluded his participation in MCMLS. By the terms of a consent order signed June 24, 1977, plaintiff has been permitted to pay his MCBR dues in escrow and to participate in MCMLS until conclusion of the case.

Association of Realtors; William G. Kircher, executive officer of MCBR; and Charles Darrah, president of MCBR. By amended complaint plaintiff elleged that in conditioning participation in MCMLS on membership in MCBR, defendants had restrained trade and conspired to restrain and monopolize trade in violation of N.J.S.A. 56:9-3 and-4 (the monopoly theory was not pursued). Plaintiff sought injunctive relief under N.J.S.A. 56:9-10 and treble damages under N.J.S.A. 56:9-12 (the claim for damages was later waived).

On defendants' motion for summary judgment, the trail court entered judgment in favor of plaintiff pursuant to R. 4:67-5, declaring the limitation of participation in the multiple listing service to members of MCBR an unlawful restraint of trade. Pomanowski v. Monmouth County Board of Realtors, 152 N.J. Super. 100, 109 (Ch. Div. 1977). The court recognized that alleged anticompetitive activity is generally analyzed under one of two standards: either it is condemned automatically as a per se violation of the antitrust law, or it is evaluated to determine whether it in fact causes sig-

nificant harm relative to the business justification. The latter test -- the rule of reason -- is applied where restrictive conduct is not "manifestly anticompetitive," so that searching inquiry into both the degree of harm and the proferred business rationale is warranted. Continental T.V. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L.Ed. 2d 568, 580 (1977). Adopting this "rule of reason" analysis, the court found that because Board membership is "totally unrelated" to the operation of the multiple listing service, there existed no bona fide justification for restricting multiple listing service access to Board members only. 152 N.J. Super. at 108. Both MCBR and MCMLS were enjoined from denying nonembers equal access to the multiple listing service. Inasmuch as the declaratory and injunctive remedy afforded plaintiff complete relief, the court entered judgment in favor of the other named defendants. Id. at 109.

On the appeal of MCBR and MCMLS the Appellate Division agreed that the "rule of reason" analysis was appropriate; it concluded that since membership in the MCBR

was available on payment of dues to all New Jersey real estate brokers, and since plaintiff had been a member but had resigned voluntarily, the membership requirement was not "manifestly anticompetitive." Pomanowski v. Monmouth County Board of Realtors, 166 N.J.Super. 269, 271-72 (1979). However, inasmuch as the "rule of reason" analysis normally requires "'an ascertainment of the facts peculiar to the particular business,'" id. at 274, quoting White Motor Co. v. United States, 372 U.S. 253, 261, 83 S. Ct. 696, 700, 9 L.Ed. 2d 738, 745 (1963), and because the trial court's conclusions were based upon an inadequate factual basis, the Appellate Division remanded the case for a plenary hearing, on the basis of which the trial court was to "construct (its) determination with the bricks and mortar of detailed findings of fact and conclusions of law." 166 N.J. Super. at 274. We denied certification, 81 N.J. 260 (1978).

On remand plaintiff sought to establish that MCMLS controlled the real estate market in Monmoth County, so that an individual broker's participation in the service was essential to his continued

ability to compete. Plaintiff argued that far from being a mere service to members of MCBR, the MCMLS was a practical economic necessity to small brokers like himself. Finally, he contended that there was no adequate business justification for conditioning access to MCMLS on Board membership.

Defendants urged that the MCMLS share of the real estate market was far smaller than plaintiff alleged, and that in any event, restricting MCMLS access to Board members was reasonable. They argued that inasmuch as membership in the Board is open to all licensed brokers, and since neither the Board dues nor MCMLS fees are exorbitant, a requirement of Board membership has no anticompetitive effect. As additional support for their position they emphasized the linking of MCBR to MCMLS as evidenced by the many hours of volunteer services, arbitration and grievance functions, and educational benefits supplied by Board members to MCMLS.

After a hearing in which both the Attorney General, on behalf of the Antitrust Section of the Division of Criminal Justice, and the

National Association of Realtors participated as amici curiae, the trail court entered judgment for plaintiff. It determined that through MCMLS, the MCBR controlled at least 50% of the residential real estate business of Monmouth County. 175 N.J. Super. at 216. The asserted advantageous nexus between the MCBR and the MCMLS in the form of volunteer activities was not considered sufficiently important to outweigh the anticompetitive effect of the non-access fule. Id. at 218-19. Therefore the court enjoined MCBR from requiring membership in the Board as a precondition to participation in the MCMLS. In addition it awarded attorney's fees and costs of suit to plaintiff.

On this appeal on grant of direct certification, 87 N.J. 426 (1981), defendants claim that the trial court erred, both in its analysis of the defendants' market share and in its determination that membership in MCBR posed an unreasonable condition on access to the MCMLS. They contend that controlling weight must be given to federal case law, and that federal cases raising the question at issue here have all been decided in their favor. In

addition, defendants have moved to suppress the brief and appendix of the amicus curiae Attorney General. Decision on that motion was reserved until disposition of the appeal.

II

(1) This court recently recognized certain aides in the determination of the antitrust implications of arragements such as that structured by the MCBR-MCMLS, in the light of our relatively new Antitrust Act, N.J.S.A. 58:9-1 to -19.

> (C)onsonance between the federal and state enactments is required. Courts in assessing state antitrust acts patterned after the federal Sherman Act, as is the New Jersey act, have concluded that federal court interpretations of federal law constitute persuasive authority as to the meaning of the particular state enactments. Moreover, the New Jersey act is to be construed "in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it. N.JS.A. 56:0-18" (State v. Lawn King, 84 N.J. 179, 192 (1980) (citations omitted).)

Accordingly, we are required to follow "ruling judicial interpretations" on the issue before us. As to precisely that issue, however, the United States Supreme Court has rendered no decision directly on

point.[3] Nevertheless, the federal cases are useful in developing an analytical framework in which to address the restraint-of-trade question, as are other state court

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[3] Defendants invite our attention to several federal district court decisions that seem to be apposite: Brown v. Indianapolis Board of Realtors, 1977-1 Trade Reg. Rep. (CCH) 61,435 (S.D. Ind. 1977) (no antitrust violation where broker denied membership to Board of Realtors, based on failure to show "favorable business reputation in the community"); Martin-Trigona v. National Association of Realtors, 1978-1 Trade Reg. Rep. 61,915 (E.D. Ill. 1978) (memorandum opinion relying on Brown, supra, for proposition that Realtor Board, as a voluntary trade association, may properly exclude any nonmember from participation in its varied activities); Murphy v. Alpha Realty, Inc., 1978-2 Trade Reg. Rep. (CCH) 62,388 (N.D.Ill. 1978) (relying on Brown supra, for proposition that Board membership is acceptable limitation on multiple listing service participation); Colorado ex rel. MacFarlane v. Colorado Springs Board of Realtors, 1980-81 Trade Reg. Rep. 63,653 (Dist.Ct.Col. 1980) (only membership requirements necessary to efficient operation of multiple listing service permissible, where Realtor Board and multiple listing service considered single identity). Because these trial court opinions treat the multiple-listing-access-question in a cursory manner, they lack persuasive force and amount to no more than a respected source of instruction. Cf. Clairol Inc. V. Cosmetics Plus, 130 N.J. Super. 81, 94-101 (Ch. Div. 1974) (containing painstaking analysis of pertinent authorities).

decisions construing state antitrust acts in accordance with federal court interpretations of the Sherman Act. See N.J.S.A. 56:9-18.

III

The courts below judged the conduct of MCBR and MCMLS under a "rule of reason" standard, see supra at 311-12. In that connection it bears emphasis that MCBR membership is available to all on precisely the same terms: the securing of a valid real estate broker's license and the payment of MCBR dues and an MCMLS initiation fee.[4] Significant too is the fact that plaintiff had been a member of both MCBR and MCMLS for five years and then voluntarily resigned.

The subject of the considerations that dictate application of the "rule of reason" rather than the "per se" rule might in other circumstances warrant extended treatment, but the concise discussions of that

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[4] Every broker-member of MCBR is required to pay annual dues of $170 $125 when plaintiff quit the Board), plus a $40 fee for each salesperson in his employ. Each Realtor who elects to participate additionally in MCMLS is required to pay an initiation fee of $250, in addition to monthly fees of $25 and $15 for employed brokers and salespeople respectively.

provocative issue by the courts below suffice for today's purposes. See 152 N.J. Super. at 105-07, 166 N.J. Super. at 271-73. Particularly is this so in view of the parties' agreement that the "rule of reason" provides the appropriate framework of analysis for this case.

(2-4) Although we do not agree in all respects with its rulings on and analysis of the evidence, the trial court used the appropriate methodology in applying the rule. As first framed in Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L.Ed. 619 (1911), the "rule of reason" requires the court to weigh all the circumstances of a given case to determine whether the disputed practice constitutes an "unreasonable restraint on competition." State v. Lawn King, Inc., supra, 84 N.J. at 194. See also Continental T.V., Inc. v. G.T.E. Sylvania, Inc., supra, 433 U.S. at 49, 97 S.Ct. at 2557, 53 L.Ed.2d at 580. The court must subject the challenged restraint's impact on competitive conditions to probing examination. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362,(5th Cir. 1980). See also National Society of Professional Engineers v. United

States, 435 U.S. 679, 688, 98 S. Ct. 1355, 1363 55 L.Ed.2d 637, 648 (1978). The rule envisions a balancing process that scrutinizes the competitive significance of a given practice: if the probompetitive benefits of that practice exceed any anticompetitive effects, the restraint will pass muster under the Sherman Act, 15 U.S.C. 1, and likewise under N.J.S.A. 56:9-3. See Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 243, 62 L. Ed. 683, 687 (1918). This balancing process calls for two steps: first, a definition of the relevant market or markets in which the questioned restraint operates; and second, an evaluation of the "evils" inherent in the challenged practice and a weighing of those anticompetitive influences against any procompetitive justifications.

(5) For the purposes of this case, the pertinent markets are the relevant geographic and product markets. In respect of the former, the trial court correctly found Monmouth County to be the appropriate geographic market. 175 N.J. Super. 215-16. As to the relevant product market the trial court limited its analysis to a determination

of defendants' control over residential real estate in Monmouth County, excluding commercial property, farms and vacant property. 175 N.J. Super. at 216. See also United States v. Realty Multi-List, Inc., supra, 629 F.2d at 1372; Marin County Board of Realtors v. Palsson, 16 Cal.3d 920, 936, 549 P.2d 833,842,130 Cal. Rptr. 1, 10 (1976). This too was the correct approach. The evidence established that the overwhelming number of MCMLS listings are residential (defendants' own Confidential Activity Report for 1978-79 showed that 90% of all listing processed by MCMLS were residential property), and plaintiff's assertion that he dealt almost exclusively with the sale of residential property was undisputed.

The next step in applying the "rule of reason" requires examination of defendants' impact upon those markets, a point on which the record is less than clear. To evaluate that impact, the trial court looked to (1) the defendants' share of residential real estate sales in Monmouth County, and (2) the number of active Monmouth County real estate brokers participating in MCMLS.

As to the former, in the absence of any readily accessible real estate sales data source, both the plaintiff and the defendants relied on the Monmouth County tax records for the 1977 calendar year. Their review of these records produced different conclusions regarding defendants' total share of residential real estate sales: plaintiff arrived at a figure of approximately 50%, whereas defendants believed their share amounted to only 27%. The variance in these figures is not surprising, given the degree of speculation that afflicts the parties' calculations.[5] Moreover, the trial court's determination of the number of active Monmouth County real estate brokers participating in MCMLS was tainted by the demonstrable unreliability of its source: a Yellow Pages telephone book survey produced by the Antitrust Section of the

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[5] For instance, the Monmouth County tax records proved to be a doubtful source of relevant information because of the failure of those records to indicate whether a given transfer was effected through the services of a real estate broker. Consequently, although the parties could determine the dollar value of residential sales in the MCBR-chartered jurisdictional territory in 1977, they could only guess at the proportion of those sales that involved real estate brokers.

Division of Criminal Justice.[6]

(6) Accordingly, we can have little confidence that the figures presented as true indicators of defendants' market impact are reliable. Indeed, the sharp disparity in the stated percentages alone raises questions as to their accuracy. However, when these

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[6] The Yellow Pages survey sought to compare the total number of active real estate brokers in the MCBR-chartered jurisdictional territory with the number of brokers actually participating in the MCMLS. In order to arrive at the latter figure the Antitrust Section compared Red Bank-area Yellow Pages advertisers specifying that they were MCMLS participators with the MCBR membership roster. When a name appeared on both "lists", the broker was assumed to have been a member of the MCMLS, as opposed to another multiple listing service. Those Yellow Pages advertisers who concentrated on property sales other than residential real estate were excluded from the survey (the Antitrust Section offered no explanation, however, as to why condominium sellers were excluded). Because there are three Monmouth County telephone books (Red Bank, Asbury Park, and Freehold), advertisers may choose to advertise in any one or more of the Yellow Pages books. It follows then that in limiting the survey to the Red Bank Yellow Pages, the Antitrust Section may have artificially reduced its final tally of Monmouth County real estate brokers. Moreover, the entire survey rests upon the dubious assumption that all real estate brokers located in the MCBR-chartered jurisdictional territory advertise in the Red Bank Yellow Pages.

"empirical" assessments are coupled with defendants' stipulation that they were instrumental in over 25% to 29% of all real estate sales for the fiscal years 1977-78 and 1978-79, we can reasonably infer that the defendants maintain the requisite market power to warrant our further scrutiny of their conduct under the Antitrust Act.

IV

The foregoing analysis leads us to the heart of the case: a determination of the "reasonableness" of the restraint and particularly its impace on competition. Professional Engineers, supra, 435 U.S. at 688, 98 S. Ct. at 1353, 55 L.Ed.2d at 648.

In Grillo v. Board of Realtors, 91 N.J. Super. 202 (Ch.Div. 1966), the court assessed the competitive significance of the multiple listing service as a real estate marketing technique:

> There is good in the multiple listing system. It provides an effective method for selling and buying properties. The seller benefits because his property is exposed in a number of offices, hence reaches a wider market in a shorter period of time. It is also useful and convenient to the prospective buyer who is seeking a house that will suit his needs and purse. From one selling agent he can learn of many of the properties for sale in the area. In effect, the multiple listing

service operates as an exchange for the sale of real estate. The multiple listing system can potentially stimulate competition in the real estate field by placing listings in the hands of all brokers in the area (id. at 218-19.)

See also Austin, "Real Estate Boards and Multiple Listing Systems as Restraints of Trade," 70 Colum.L.Rev. 1325, 1353-54 (1970).

The procompetitive virtues of a multiple listing service are obvious; it is an ingenious mechanism for reducing the market imperfections inherent in the real estate industry. It operates as a clearing house of sorts in that the purchaser has access to a wide selection of properties and the vendor-broker is exposed to a larger market than could be reached through the unaided efforts of a single seller. At the same time, however, where the service has substantial market power, an excluded broker may be unable to compete effectively, given his limited abilities to find prospective purchasers and offer a range of listings comparable to those held by the service. The individual broker so situated "has only a limited supply of 'shoes on the shelves.'" Oates v. Eastern Bergen County Multiple

Listing Service, Inc., 113 N.J. Super. 371, 382 (Ch.Div.1971) (absolute exclusion of broker by independently-run multiple listing service held violative of Antitrust Act).

Defendants contend that since a trade association is entitled to confine its benefits to members, and since participation in MCMLS is a membership benefit offered by MCBR, there is no antitrust violation in limiting MCMLS access to Board members. Although there are multiple listing services that operate independently of realtor boards, defendants argue that MCMLS is "inextricably interconnected" with MCBR and thereby dependent upon the Board for its success. Further, defendants assert that this "interconnection" enables MCMLS to achieve certain pro-competitive benefits that would be unavailable were the MCMLS independent. First, they point out that MCMLS uses both the National Association of Realtors trademark and the Multiple Listing Service logo. See n.1, supra at 310. These symbols purportedly attract customers by assuring the public of the propriety of the business organization with which they are dealing. Additionally, MCBR promulgates a code of ethics, imposes sanctions upon delinquent members, and provides facilities

for arbitration of disputes and resolution of ethics complaints. These assurances, the argument goes, help to overcome the reluctance of home-sellers to authorize multiple listing service brokers to serve as sub-agents of the listing broker.

Of pivotal importance, however, is the fact that MCMLS shares office space, personnel, and equipment with MCBR. Moreover, MCBR members volunteer hundreds of hours to the operation of MCMLS. As a consequence, defendants contend, Board affiliation provides MCMLS with economies of operation not available to an independent multiple listing service. Defendants argue that because Board members would hardly volunteer time and agree otherwise to subsidize MCMLS if its benefits were available equally to nonmembers of the Board, the effect of severing MCMLS participation from Board membership would be to increase the operating cost of MCMLS. The result would be the erection of a barrier to entry represented by the increased cost of running such a multiple listing service.

In evaluating these contentions, the trial court implicitly assumed that the proper question was whether MCMLS could survive if if functioned independently of MCBR. Thus,

the court pointed to testimony that "demonstracted that an independent MLS can function efficiently although it is not a part of a realtor organization." 175 N.J. Super. at 219[7]. Whatever benefits the Board bestowed on MCMLS could be duplicated, since "an independent MLS would be free to develop its own committees on arbitration,

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[7] Although the trial court relied heavily on the testimony of Harry J. Gerlach, executive officer of the Multiple Listing Service of Northern New Jersey, to establish that multiple listing services do operate without Realtor Board sponsorship, it appeared to ignore the fact that the initiation fee for the Northern New Jersey Multiple Listing Service is $1300 as compared to the $250 fee maintained for the MCMLS. The annual cost of MCBR membership with MCMLS participation for a broker and one salesperson is $690. The annual cost of Northern New Jersey Multiple Listing Service membership for a broker with a single salesperson is $308 plus $25 for each listing submitted. To a firm that handles fifteen listings, then, the cost of the two memberships is roughly equal. An apples-aranges comparison does not, of course, demonstrate that Board-affiliated multiple listing service participation is chéaper. It does suggest that in focusing on whether MCBR benefits could be reproduced outside the organization, the trial court appeared to brush aside the possibility that the cost of such benefits might then be substantially higher. The court appears not to have considered the procompetitive benefits (as opposed to the benefit to MCBR or to MCMLS) that arises from Board sponsorship of MCMLS.

education or affirmative action." Id. Finally, the court noted that it was "simply not convinced that multiple listing in Monmouth County will cease unless it is part of the MCBR." Id.

(7)The appropriate question, however, is not whether MCMLS would be destroyed in the absence of the challenged MCBR membership rule (almost certainly it would not), but rather whether the anticompetitive effects of conditioning MCMLS access on Board membership are outweighed by the pro-competitive gains that flow from Board sponsorship of MCMLS. If that competitive benefit would be lost, and if such loss would outweigh the negative effect of the access rule, then the rule is an acceptable limitation on competition. See Professional Engineers, supra, 435 U.S. at 688, 98 S.Ct. at 1363, 55 L.Ed.2d at 648. In centering its inquiry upon whether MCMLS would survive absent the access rule, the trial court failed to strike the necessary balance.

Moreover, the trial court treated the case as one involving a denial of access; it apparently attached little significance to the fact that plaintiff's withdrawal from the MCMLS was voluntary and that he is free

to rejoin on payment of his MCBR dues. 175 N.J. Super. at 220-21. The question of access to multiple listing services has been dealt with previously in two New Jersey cases, Grillo v. Board of Realtors, supra, and Oates v. Eastern Bergen County Multiple Listing Service, Inc., supra. In both Oates and Grillo, the exclusion was absolute -- in Oates the plaintiff realtor was denied access to the defendant multiple listing service; in Grillo multiple listing service participation was conditioned on Realtor board membership, which was denied to plaintiff. The courts found in Oates a violation of the Antitrust Act and in Grillo a common law restraint of trade. The court in Grillo, however, distinguished that case from one in which access to the multiple listing service, while conditioned on Realtor Board membership, was as a practical matter upen to all. "If every licensed real estate broker in the Plainfield area could become a member of the Board for the asking, no non-member would have cause for complaint about being excluded from the benefits of the multiple listing service." 91 N.J. Super. at 210.

Although a number of courts in other jurisdictions have ruled on the question of

access to a multiple listing service, most cases have arisen in the context either of exclusion from an independent multiple listing service, United States v. Realty Multi-List, supra, (multiple listing service's restrictions on membership held unreasonable restraint on trade); Blake v. H-F Group Multiple Listing Service, 36 Ill. App.3d 730, 345 N.E.2d 19 (App.Ct. 1976) (exclusionary membership requirements of multiple listing service do not violate Antitrust Act absent a deleterious effect on competition); Grempler v. Multiple Listing Bureau, 258 Md. 419, 266 A.2d 1, 45 A.L.R.3d 180 (Ct.App. 1970) (membership requirement of multiple listing service reasonable), or exclusion from Realtor membership where such membership was required for multiple listing service participation, Brown v. Indianapolis Board of Realtors, supra (broker denied membership in board of realtors, based on failure to show "favorable business reputation in the community" -- no antitrust violation); Collins v. Main Line Board of Realtors, 452 Pa. 342, 304 A.2d 493 (Sup. Ct. 1973) (broker denied membership in Board of Realtors; Board ordered either to admit brokers as members or to permit non-

members to participate in multiple listing service).

The few courts that have considered whether multiple listing service participation may be conditioned on realtor board membership absent any exclusionary membership requirement have reached varying results. In Marin County Board of Realtors, Inc. v. Palsson, supra, a realtor board required that applicants for membership be "primarily engaged" in the real estate business, and denied nonmembers access to its multiple listing service. The court held that "(t)he board's rules denying access of nonmembers to the multiple listing service must be eliminated, although nonmembers may be charged a reasonable fee for use of the service consistent with the per-capita costs of operation." 549 P.2d at 845, 130 Cal.Rptr. at 13. The court noted that an association's freedom to exclude nonmembers from its activities is not absolute, and must yield to the antitrust laws when the association has market power and its activities correspond directly with the business activities of its members. Id. at 843, 130 Cal.Rptr. at 11.

The Iowa Supreme Court recently addressed

the question in State v. Cedar Rapids Board of Realtors, 300 N.W.2d 127 (Iowa 1981). There, the Cedar Rapids Board of Realtors had developed a multiple listing service exclusively for Board members. The State filed an action under the Iowa Competition Act, which, like the New Jersey Antitrust Act, is patterned after the Sherman Act. The State claimed that conditioning brokers' access to the multiple listing service on Board membership was an unreasonable restraint on trade. 300 N.W.2d at 129. Relying upon Professional Engineers, supra, the Court framed the crucial inquiry as being "(w"hether a restraint suppresses competition ***", id., not whether the agreement affords the parties thereto an edge over competitors. To this end, the court observed that:

> (t)he State's proposed solution would give a few competitors a monetary advantage over the MLS brokers whose organizing ability, money, and volunteer time has made the service a viable tool for effective selling. Judge Learned Hand's admonition is relevant: "The successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945). [Id. at 129-30.]

The court condluded that "so long as Board membership is available to all on a nondiscriminatory basis as this record indicates, we will not compel this private trade association to share one of its membership benefits with brokers who, for whatever personal or business reasons, declined to join." Id. at 131.

Significantly, the Court in Cedar Rapids interpreted the Marin County decision as holding that it was the combination of two Board by-laws -- denial of membership to part-time salesmen and denial of multiple listing service access to non-members -- that unreasonably denied nonmembers access to the multiple listing service. We agree

with that interpretation of Marin County.[8]

(8) Moreover, the reasoning of Cedar Rapids in assessing the competitive significance of the restraint in that case is persuasive. Where there are no exclusionary

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[8] In People v. National Association of Realtors, 120 Cal.App.3d 459, 174 Cal.Rptr. 728 (Ct.App. Cal.1981), a California Court of Appeals spcifically declined to follow the Cedar Rapids court's interpretation of Marin County. Id. 174 Cal.Rptr. at 732. The court struck down as an illegal group boycott a realtor board rule that conditioned multiple listing service access on board membership. It described the Marin County decision as having "analyzed each restriction separately, found each to have anticompetitive effects far outweighing any possible business justification (the Rule of Reason test) and separately disapproved the MLS limitation for access to Board members only." Id. We view that conclusion as erroneous and agree with the Cedar Rapids interpretation that it was the combination of two Board by-laws that amounted to the antitrust violation. The following language from Marin County is particularly significant:

> We emphasize that the question before us concerns the validity of the "primarily engage" rule in conjunction with other board bylaws effec - tively denying employment to nonmember salesmen. [16 Cal.3d at 938 n.13, 549 P.2d at 844 n.13, 130 Cal.Rptr. at 12 n.13 (emphasis added).]

conditions attached to Realtor Board membership, and there is no contention that the cost is prohibitively high, it is difficult to see any affront to competition. Although we agree that MCMLS has a substantial market impact on the residential real estate community in Monmouth County, it does not logically follow that the MCBR membership requirements stifle the free flow of competitive forces in that market. Further, there has been no showing that the elimination of the access rule will effect any procompetitive benefits -- that MCMLS participation will be less expensive or even reamin the same, or that a greater number of brokers will thereby be able to achieve access. Absent any showing of a true denial of access, the defendants should not be required to dismantle or significantly alter a trade association that provides procompetitive benefits in excess of any anticompetitive effects engendered. Accordingly, we conclude that in conditioning MCMLS access on MCBR membership, defendants have created a reasonable restraint of trade -- one not in violation of our Antitrust Act.

V

(9) Defendants' motion for suppression of the brief and appendix of the amicus curiae is directed at the contents of the appendix, particularly the galley proofs of an article that later appeared at 11 Seton Hall L.Rev. 396 (1981). The article was written by the Deputy Attorney General who authored the amicus brief and testified as plaintiff's expert witness at trial. The appendix contains as well a variety of other material, including newspaper and magazine articles, the transcript of a hearing before the New Jersey Real Estate Commission at which the same Deputy Attorney General appeared as a witness, a portion of a brief submitted by the New Jersey Association of Realtors to the United States Supreme Court in an unrelated matter, and a copy of a consent decree likewise filed in another case.

No extended discussion is required to demonstrate the impropriety of the gratuitous inclusion of these materials in the Attorney General's filings. As for the law review article, it contains a statistical analysis of complaints filed against licensed real estate practitioners in New Jersey, which

the trial court had refused to accept into evidence. Although the article as a whole may, as the Attorney General contends, transcend the present case, the fact reamins that in including it in his appendix, the Attorney General has put before the Court evidence directly related to this case that was explicitly excluded by the trial court. The Attorney General argues that the article is "secondary source authority." This contention is just silly. The article is not the product of an independent and disinterested scholar. Its author not only wrote the Attorney General's brief but was plaintiff's expert at trial. In essence, by making his article a part of the record, he is offering to the Court as secondary source authority his comment on his own testimony at trial, as well as his view of defendants' case. The evidence contained in the appendix is clearly factual and evidential. As such, its inclusion amounts to a circumvention of the requirements of R.1:5-5.

Accordingly, we have disregarded so much of the material in the appendix to the Attorney General's amicus brief as was not part of the

record below, as well as all references to that material contained within the body of the brief. To that extent the motion is granted.

VI

The judgment of the trial court is reversed. The cause is remanded to the Chancery Division for entry there of judgment in favor of defendants. No costs.

REPORTED AT 89 N.J. 306.

IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MONMOUTH COUNTY WAYNE C. POMANOWSKI, PLAINTIFF, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERED BY THOMAS L. YACCARINO, J. S. C.

This case addresses the question of whether the requirement that a real estate broker join local, state and national realtor boards before he may have access to a multiple listing service violates the New Jersey Antitrust Act, N.J.S.A. 56:9-1 et seq. On a motion for summary judgment this court, applying the rule of reason analysis, determined that such a restriction does create an unlawful restraint of trade, 152 N.J. Super. 100. On appeal, the Appellate Division agreed that the rule of reason analysis was appropriate but reversed and remanded for detailed findings of act. 166 N.J. Super. 269. A lengthy hearing was held, at which

time the court made the following findings.

(1) Our antitrust law, as modeled after the Sherman Act, prohibits "(e)very contract, combination . . . or conspiracy in restraint of trade or commerce." N.J.S.A. 56:9-3. Not all restraints, however, are illegal. It is only those contracts which unreasonably restrain trade that are prohibited. Finlay & Assoc. Inc. v. Borg-Warner Corp., 146 N.J. Super. 210 (Law Div.), aff'd 155 N.J. Super. 331 (App. Div. 1976). In applying the "rule of reason" analysis to determine which contracts or combinations are unduly restrictive, a court must "focu(s) directly on the challenged restraint's impact on competitive conditions." Nat'l. Society of Professional Engineers v. U. S., 435 U.S. 679, 98 S. Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978). Such a study involves an evaluation of the facts peculiar to the business, the history of the restraint and the reasons why it was imposed. Id. at 1365. The end product is "to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Id (emphasis supplied).

Significant to such a determination is the percentage of business controlled, compared to the strength of the reamining competition. U. S. v. Columbia Steel Co., 334 U.S. 495, 527, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948). The impact of the Monmouth County Multiple Listing Service (MCMLS) on the real estate business in Monmouth County, whether viewed statistically or in light of the realities of the marketplace, is substantial.

The need for a multiple listing service (MLS) is twofold. The numerous listings provided through the MCMLS are important to buyers as a means of providing a wide range of selection. Similarly, most sellers prefer the increased market available to them through MLS. Consequently, when plaintiff terminated his membership with the Monmouth County Board of Realtors (MCBR) and thereby lost access to the MLS, which is provided by the Board to its members, his sales staff left him, since his own small business with its insignificant number of listings could not compete with the advantages of an office with access to MLS. See Oates v. East Bergen Cty. Multiple Listing Serv., 113 N.J. Super. 371, 380-82 (Ch. Div. 1971);

Grillo v. Bd. of Realtors of Plainfield, 91 N.J. Super. 202, 220-21 (Ch. Div. 1966).

(2) Before discussing the impact of the MCMLS in terms of volume, it is necessary to determine the relevant marketplace. See Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 2d 930 130 Cal. Rptr. 1, 549 P. 2d 833 (Sup. Ct. 1976). On this question, the court is of the opinion that the study be limited to Monmouth County, excluding those nine municipalities which comprise the Southern Monmouth County Board of Realtors. See United States v. Tracinda Investment Corp., 477 F. Supp. 1093 (C. D. Calif. 1979). The Southern Monmouth County Board has its own MLS and defendants offered no proof to indicate that this area had any impact on the MCBR's territory. Besides the fact that the MCBR's jurisdictional territory is limited to the county, it was clearly established that at least 85% of the listings processed by the MCMLS come from the MCBR territory. This finding is supported by the plaintiff's study of his listings available on a given date. For January 22, 1980, of 2,427 listings in the book, 2077 of those listings were in the MCBR jurisdictional territory.

Furthermore, a study conducted by William Trombetta of the Anti-trust Section of the State Division of Criminal Justice indicated that for a two-month period covering November and December 1975, only 6% to 8% of the listings were from outside the jurisdictional territory.

The court is further of the opinion that the relevant market place must be restricted to residential sales. See Marin Cty. Bd. of Realtors v. Palsson, supra. Trombetta, qualified as a marketing expert, testified that, from a marketing standpoint, residential and commercial markets are of interest to different segments of the public with different needs. In addition, in reviewing the MLS Activity Report for 1978, it appears that residential listings comprised approximately 90% of the listings. Moreover, 97% of those listings resulted in closed sales of residential property.

In light of the foregoing, the court has determined that through MLS, the MCBR controls at least 50% of the residential real estate business of the County. Defendants had stipulated to having processed 25% and 29% of all sales for the fisal years 1978 through 1979 and 1977 through 1978.

However, these figures include commercial property, farms and vacant property which should be excluded, since, as noted above, the relevant market is residential sales. By excluding the nonresidential categories of sales, the percentage is higher since the total number of relevant sales is less than as calculated by defendants. Defendants also, in this court's opinion, wrongfully excluded intra-office sales. While such property was sold by the listing broker, it was nevertheless multiple-listed and, as such, available to other brokers. It is the fact of listing and sale of residential property through MLS that is relevant to this court.

Returning to plaintiff's figures, for the calendar year 1977 there was a total of $319 million sales volume of residential property in Monmouth County. Of this sum $233 million of sales were processed through MLS, showing 70% of the business going through MLS. This percentage was lessened, however, when the dollar value of nonusables in categories where brokers may participate was added to the total sum of residential sales. The figure was further lessened by factoring out 10% to 15% to allow for out-of-jurisdiction sales. The

lowest figure, however, was 50% of all sales.

The 1978 Monmouth County telephone book "Yellow Pages" were also used to conduct an analysis of the number of real estate brokerage firms that were Monmouth County MLS members. Specialists in rentals, condominiums, development companies and independent brokers (so stated in the Yellow Pages) were immediately removed. Out of a total of 260 brokerage firms, 40 were immediately removed, leaving 220 firms as the relevant market base according to the Yellow Pages.

The remaining firms were identified as members in the MCMLS from information obtained in the Bluebook of the Monmouth County Board of Realtors, and in the listing as an MCMLS member in the Yellow Pages. This resulted in a total of 172 MCMLS members.

The remaining 48 brokerage firms were then called. Sixteen firms were then eliminated from the 48 firms. These were firms which were not active, could not be contacted, or who were not residential real estate firms. Eighteen of the remaining listings called were not MCMLS

members. The remaining 14 firms called were MCMLS members. Therefore, the 220 Yellow Page listings for Monmouth County were broken down accordingly:

Total: 220	Eliminated	MCMLS Member
Bluebook		172
Called: 48	34	14
		186

Market Share: $\frac{186}{220} = 84\%$

Finally, plaintiff testified that he used the roster of MCMLS participants, provided by the defendants in discovery, to determine the number of brokerage agencies and salespersons participating in the MCMLS. This count by plaintiff indicates that there were 228 real estate brokerage agencies/brokers and 1,664 real estate salespersons participating in the MCMLS. Therefore, on one hand, the listings obtained by plaintiff are disseminated to almost 1,900 brokers and salespersons rather than to plaintiff and his three salesperson, and, on the other hand, plaintiff and his sales staff have access to listings produced by almost 1,900 real estate brokers and salesperson.

(3) Under a "rule of reason" analysis, consideration must also be given to the possible justifications for the practices. Bd. of Trade of Chicago v. U.S., 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918). In this regard, defendants urge that the nonaccess rule is justified by the nexus existing between the MCBR and the MLS.

Primarily, defendants referred to the integration of activities between the Board and MLS. For example, it was testified that Board members volunteer countless hours to the MLS committee, and that the Board's arbitration and grievance services provide mediation between MLS participants and aggrieved members of the public. In addition, it was shown that the state and national realtor organizations provide educational benefits in connection with MLS. While there is undoubtedly some interrelationship between the various committees of the MCBR, this court is not convinced that it is substantial or that it outweighs the impact of the nonaccess rule.

The court would first refer to the history of the concept of a multiple listing

service. Robert F. Ferguson, executive vice president of the New Jersey Association of Realtors, testified to the reluctance on the part of local boards initially to accept multiple listing. It was only after numerous campaigns were waged stressing the benefits of such a service that it became popular. As such, the court is not convinced that, as defendants have urged, the MCBR will lose its raison d'etre if the Board must upen the MLS to non-realtors, or the MLS becomes independent.

Secondly, the court would point out that the testimony of Harry J. Gerlach, a realtor and executive officer of the MLS of Northern New Jersey, demonstrated that an independent MLS can function efficiently although it is not a part of a realtor organization. Any grievances may be addressed to the State Real Estate Commission. Moreover, the independent organization is totally self-supporting, thus obviating the need for volunteers from outside those participating in the service. Finally, in Gerlach's opinion the realtor membership and information which he gained as a realtor had no effect on management of his MLS.

Furthermore, plaintiff has posited that defendants have less onerous means available to promote their benefits. In United States v. Third National Bank in Nashville, 390 U.S. 171, 88 S. Ct. 882, 19 L. Ed. 2d 1015 (1968), the court stressed that the proponents of a bank merger bore the burden of establishing that the benefits expected could not be obtained by an alternate means. In a similar vein, this court finds that an independent MLS would be free to develop its own committees on arbitration, education or affirmative action. Moreover, the court is not convinced that if MLS were separate from the MCBR, the Board would necessarily lose its members. Indeed, such a position would indicate that MLS is nothing more than a drawing card for the Board, thus questioning further the reasons why the Board wishes to allow access to MLS to only MCBR members.

Giving due regard to the court's opinion in State of Iowa, ex rel. Miller v. Cedar Rapids Real Est. Bd., 1979 Tr. Cas. 63,102 at 77,043 (D.C. Iowa 1979), that the dependence of the MLS on the local board justified the nonaccess rule, this court is simply not convinced that multiple listing

in Monmouth County will cease unless it is part of the MCBR.

Defendants also argued that the Code of Ethics which controls members of the MCBR and the numerous educational programs provided by both the local and national boards benefit those consumers who purchase through MLS. The court in Marin Cty. Bd. of Realtors v. Palsson, supra, rejected this justification, noting that the Board had failed to show any increase in professional or ethical competence, 549 P. 2d at 845. Similarly, this court finds that defendants have no data to support their contention that a number of the public readily associates the realtor and MLS trademarks with "knowledgeable, efficient and honest handling of real estate transaction." Rather, empirical studies of consumer complaints conducted by the Attorney General's office indicated that at a minimum, no discernable difference existed in the reliability of a Realtor as opposed to a broker who was not a realtor.

Defendants have also attempted to make much of the fact that plaintiff voluntarily withdrew his membership in the MCBR. They refer to Maryland decision in Grempler v.

Multiple Listing Bur. of Harford Cty., Inc., 258 Md. 419, 266 A. 2d 1 (Ct. App. 1970), wherein the court upheld the Bureau's requirement that an applicant maintain an office in the county in order to gain access to the local MLS. This case is distinguishable, however, since the court specifically noted that not only had plaintiff failed to support her contention that the Bureau amounted to a monopoly, but also that of the 72 licensed brokers in Harford County, 58 were members of the real estate board, while only 12 were associated with the multiple listing bureau. 266 A. 2d at 6. Thus, the significance of access to a multiple listing service appeared to the court in Grempler to be minimal.

Barrows v. Grand Rapids Real Est. Bd., 51 Mich. App. 75, 214 N.W. 2d 532 (App. Ct. 1974), also appears to be inapplicable to the case at bar. There, too, Board membership was required before a broker could obtain access to multiple listing. In upholding the requirement, the court noted the interrelationship between the Board and the MLS. However, the court also went on to note that the testimony established the ability of nonrealtor brokers to

successfully compete with members of the Board and also that the MLS made substantially less than 50% of the real estate sales in the area and that a substantial number of realtors are not members of the local board. 214 N.W.2d at 540. Based on the findings previously discussed, the impact of MLS in Monmouth County is certainly greater, and, in this court's opinion, requires more of justification than the various interrelationships noted above.

While the decision of Collins v. Main Line Brand of Realtors, 452 Pa. 342, 304, A.2d 493 (Sup. Ct.), cert. den. 414 U.S. 979, 94 S. Ct. 291, 38 L.Ed.2d 223 (1973), is also distinguishable in that plaintiff was denied access as opposed to voluntarily withdrawing from the Board, the court nevertheless acknowledged that the relevant test for an anti-trust vilation is whether or not a broker without access to multiple listing can successfully compete with those who do have access. 304 A.2d at 496. The voluntariness of plaintiff's action, therefore, is not controlling.

(4) It is the considered opinion of the court that the MCBR through the MLS,

controls a substantial segment of the real estate market in Monmouth County. To deny plaintiff, a non-realtor, access to that MLS has the effect of foreclosing his ability to successfully compete in the real estate business. Moreover, the proposed justification for the rule, the amount of support given to MLS by the Board, does not outweigh the damage to plaintiff. The court, therefore, finds, based upon the evidence and applicable law, that the nonaccess rule does violate the new Jersey Antitrust Act, and judgment will be entered in favor of plaintiff.

REPORTED AT 175 N.J. Super. 212.

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION WAYNE C. POMANOWSKI, PLAINTIFF-RESPONDENT, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE, DEFENDANTS-APPELLANTS, AND NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERY BY FRITZ, P. J. A. D. Defendants appeal from summary judgment entered below in favor of plaintiff, declaring defendants guilty of an unlawful restraint of trade and fashioning appropriate injunctive relief. 152 N. J. Super. 100 (Ch. Div. 1977). The context in which this appeal arrives is sufficiently set forth in the trial court opinion. As succinctly put there, and true here, "the issue before the court is whether membership in a county board of realtors -- even where open to all licensed real estate brokers and salesmen -- may be deemed a condition precedent to participation in the board's multiple listing service without offending the New Jersey Antitrust Act, N.J.S.A. 56:9-1 et seq." 152 N. J. Super, at 103.

(1) Although we find it necessary to reverse and remand, we are not in essential disagreement with much that is said in the opinion below. We need not join in the implicit criticism there of Oates v. East Bergen Cty. Mult. List. Serv., 113 N. J. Super. 371 (Ch. Div. 1971), and Grillo v. Bd. of Realtors of Plainfield Area, 91 N. J. Super. 202 (Ch. Div. 1966), however. We observe that those cases are in any event distinguishable on their facts. In both there were restrictions on membership found to be exclusionary. Such is not the case here. Accordingly, we need neither expressly approve nor disapprove Oates and Grillo. It is enough that we agree with the trial judge that, substantially for the reasons set forth by him, the so-called "per se" rule is not applicable to the facts of this case where membership is available to all on precisely the same terms, i. e., a valid state license and the payment of dues. It is notable that plaintiff here was a member of the board and voluntarily resigned.

In these circumstances we do not find "conduct that is manifestly anticompetitive," and it is only in that setting that per se

rules of illegality are appropriate. Continental T. V. Inc. v. GTE Sylvanis Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).[1]

(2) At this point it is appropriate to comment that we also concur in the conclusion expressed in footnote (2) (152 N. J. Super. at 107) that, nevertheless, if defendants' activities do in fact offend the statute, defendants are not immune by virtue of N. J. S. A. 56:9-5(a); that section by its terms limits its operation to activities "not otherwise in violation of this act."

(3) Which brings us to our agreement with the trial judge that the exclusion of non-board members from the board operated multiple listing service must be examined

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1 There is an extraordinary reliance on federal case law in connection with interpretation of the New Jersey Antitrust Act (N.J. S. A. 56:9-1 et seq.), not only because of the dearth of state case law interpretation of this relatively new state legislation, but also because that statute itself mandates such effectuation "insofar as practicable, (of) a uniformity in the laws of those states which enact it." N.J.S.A. 56:9-18. See Exxon Corp. v. Wagner, 154 N. J. Super. 538, 544 (App. Div. 1977).

for reasonableness in order to determine whether it is an illegal restraint of trade. This is consistent with the so-called "rule of reason" analysis of activities such as these.

This rule of reason was articulated as long ago as Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Recognized and applied over the years, it requires the fact finder to weight "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T. V. Inc. v. GTE Sylvania Inc., Supra, 433 U.S. at 49, 97 S. Ct. 2549, 2557. A concise description of the scales upon which this weighing is to be performed is found in the frequently cited Board of Trade v. United States, 246 U. S. 231, 38 S. Ct. 242 (1918). There Mr. Justice Brandeis said, in connection with his comment that restraint of trade along could not determine illegality since restraint was the "very essence" of agreements and regulation of trade:

> * * * The true test of legality is whether the restraint imposed is such as merely

regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences * * * (246 U. S. at 238, 38 S. Ct. 242 at 244.)

It is in respect to the weighing process that we part company with the trail judge. He was content to decide the matter on affidavits and, perhaps unimportantly, not on a motion of plaintiff who ultimately prevailed and who had not made a motion for judgment, but on defendants' motion. We are concerned that in a matter where the ruling would reach far beyond the particular case, the determination has arrived predicated upon a sparse, relatively uninformative and certainly lifeless record. Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969).

(4) Further, we are not satisfied that even if this particular case were the only

one involved in the problem, the record thus produced is sufficient to result in a decision in which we might have confidence. We cannot share the certitude of the trial judge, in his response to his own inquiry as to whether that which is the subject of complaint in the case is a reasonable restraint of trade, when he opines that "(u)nder the facts of this case it clearly is not," because we are not at all certain that those facts have been sufficiently displayed. The generalized, abbreviated and, it would appear in some cases speculative findings of the trial judge do not reassure with respect to our present trepidations.

As is said in White Motor Company v. United States, 372 U.S. 253, 261, 83 S. Ct. 696, 701, 9 L. Ed. 2d 738 (1963), "That 'rule of reason' normally requires an ascertainment of the facts peculiar to the particular business." While there is a smattering of this, we feel, as the court felt in White Motor, "we know too little of the actual impact (of the restriction and of the other factors of Board of Trade v. United States, supra) to reach a conclusion on the bare bones of the documentary evidence before us." Ibid.

Consequently, we find it necessary to remand for a plenary hearing in which the foregoing principles may be applied. Needless to say, the trial judge must then construct his determination with the bricks and mortar of detailed findings of fact and conclusions of law.

In view of our determination we need not and should not consider the alleged constitutional right of nonassociation (or freedom of association) espoused by the Attorney General in his amicus curiae brief on behalf of the Antitrust Section of the Division of Criminal Justice. The issue was not raised or argued below. To the extent this alleged right may reflect policy considerations which might affect a rule of reason determination, the trial judge may choose to consider it on the remand.

Reversed and remanded. We do not retain jurisdiction.

REPORTED AT 166 N. J. SUPER. 269.

IN THE SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, WAYNE C. POMANOWSKI, PLAINTIFF, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERED BY YACCARINO, J.S.C. (1) The issue presented to the court by the facts of this case is one which has not been the subject of a reported decision in this jurisdiction but one which has far-reaching effects upon the real estate industry in this State as well as nationally. Simply stated, the issue before the court is whether membership in a county board of realtors -- even where open to all licensed real estate brokers and salesmen -- may be deemed a condition precedent to participation in the board's multiple listing service without offending the New Jersey Antitrust Act, N.J.S.A. 56: 9-1 et seq. As all of the named

defendants[1] have moved for summary judgment rendered thereon pursuant to R.4:67-5.

The facts of the case may be stated as follows. In contrast to the usual factual context where a plaintiff has been excluded from membership in the county board of realtors, plaintiff Wayne C. Pomanowski, a real estate broker licensed by the State of New Jersey, trading as the Thompson Agency, was a member of defendant Monmouth County Board of Realtors from about July 1972 until March 31, 1977. Plaintiff's termination of membership was voluntary and he has stated by way of affidavit that such decision was motivated by his disagreement with the philosophy and conduct of the county, state and national organizations.

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[1] Plaintiff instituted this action against all parties having even a remote connection to the cause of action. Not only were the Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service, a committee of the county board, made parties defendant, but Charles Darrah, president of the county board, the New Jersey Association of REaltors and the National Association of Realtors were joined. As complete relief can be afforded in regard to the rather abstract issue presented by considering the roles of the first two defendants, simplicity suggests that consideration of the ancillary defendants be limited.

This divergence of viewpoints obviously did not extend to the county board's multiple listing service.

But for the payment of dues and licensing by the State, there are no criteria for membership in the Monmouth County Board of Realtors. For the year 1977 the Thompson Agency was required to pay dues in the sum of $250: $170 for an active member (plaintiff) and $80 for two realtor-associates. Interestingly, the dues assessment is comprised of a membership fee for the county board and the state and national association. No one may choose to restrict membership to only the local organization.

To become a member of the Monmouth County Multiple Listing Service one need only be an active member in good standing of the Monmouth County Board of Realtors, comply with the rules and regulations of the multiple listing service which provides, among other things, for the division of commissions and specific service charges, and pay an initiation fee in the sum of $500. As in plaintiff's case, failure to pay dues to the county board (and, of course, to the state and national associations) automatically terminates eligibility to

participate in the multiple listing service. It is important to note, however, that the rules and regulations of the multiple listing service provide that the initiation fee "shall approximate the actual costs of bringing the service to the participant." Also noteworthy is the fact that not all multiple listing services require membership in the county or other realtor organization. Plaintiff has submitted to the court a survey, the accuracy of which was conceded at oral argument, of 35 multiple listing services in this State. Eight services are open to realtor members and nonmembers alike.

In sum, the plaintiff in this case is not one who has been excluded from membership in the organization which furnishes the multiple listing service. Plaintiff's allegation that the nexus between the county board of realtors and the multiple listing service, that is, the essentially nondiscriminatory exclusion of nonmembers from participation in the service, constitutes an unlawful restraint of trade rests solely upon plaintiff's decision to discontinue funding of the realtor organizations.

None of the defendants in this case has challenged the applicability of the antitrust

laws to the multiple listing service on the grounds of lack of economic necessity to plaintiff or its insubstantial effect on the relevant real estate market. Both issues find ready answer. As to the former, the advantages of participation in a multiple listing service are common knowledge and have been clearly delineated by case law. E.g., Oates v. Eastern Bergen Cty. Multiple Listing Service, 113 N.J. Super. 371. 381-82 (Ch. Div. 1971); Grillo v. Board of Realtors of Plainfield Area, 91 N.J. Super. 202, 218-19 (Ch. Div. 1966). As to the latter, it suffices to note that the Monmouth County Board of Realtors has been described as "one of the largest and most active Boards in the State of New Jersey with more than 260 Realtor members and more than 1,400 Realtor Associates." 19 N.J. Realtor 7 (April 1977). To be sure, the ability to restrain trade is apparent. (marin Cty. Bd. of Realtors, Inc. v. Palsson, 130 Cal. Rptr. 1, 549 P. 2nd 833, 842 (Sup. Ct. 1976).

Cases involving edclusion from organizations providing multiple listing services both in this State and in other

jurisdictions have taken a variety of approaches and have reached divergent results. Oates v. Eastern Bergen Cty. Multiple Listing Service, supra (severe restrictions on membership in organization providing multiple listing service held per se violation); Grillo v. Board of Realtors of Plainfield Area, supra (exclusion of nonmembers of county board from its multiple listing service contravention of rule of reason); Marin Cty. Board of Realtors, Inc. v. Palsson, supra (qualifications beyond state licensing by board offering multiple listing service held invalid under rule of reason; application of per se rule specifically rejected); Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A. 2d 493 (Sup. Ct. 1973) (restrictions on membership beyond state-imposed requirements held illegal per se); Barrows v. Grand Rapids Real Estate Bd., 51 Mich. App. 75 214 N. W. 2d 532 (App. Ct. 1974) (membership restrictions not invalid under rule of reason; no evidence of substantial control of market by board); Grempler v. Multiple Listing Bureau, Inc., 258 Md. 419, 266 A. 2d 1 (Ct. App. 1970) (require-

ment that applicant maintain main office in county upheld; rule of reason and right to admission into voluntary association analysis employed).

While both of the cases in this jurisdiction have found restrictions upon membership in organizations providing multiple listing services to be unlawful restraints of trade, the cases have employed divergent analyses. Grillo, supra, which was decided prior to the adoption of our state antitrust law, applied the rule of reason test although it is abundantly clear from that opinion that the court leaned heavily toward application of the per se doctrine. Oates, supra, decided under the state antitrust act, followed the per se approach. Neither case was the subject of appellate review, leaving this court of coequal jurisdiction in a relatively uncharted sea. The threshold issue of which test is to be applied is squarely raised by the parties.

(2-4) Having duly considered the matter, this court is of the opinion -- despite the holding in Oates and the court's apparent predisposition in Grillo -- that a per se analysis cannot be employed for an

alleged concerted refusal to deal of this nature. Both Oates and Grillo relied upon cases such as Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941); Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1944); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207,79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), and Silver v. New York Stock Exchange, 373 U. S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963), which declared in sweeping language that group boycotts or concerted refusals to deal are per se illegal restraints of trade. Those cases are readily distinguishable, however, having as their aim the prevention of "a particular type of predatory activity." Marin Cty. Board of Realtors, Inc. v. Palsson, supra, 549 P. 2d at 840. As was noted in that case, the

> * * * limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test. * * * This trend, while not universal, indicates a recognition by the courts that trade associations may perform beneficial services for their members and society . . . In the course of

providing these benefits, the associations often exclude nonmembers. But such exclusion, unless directly aimed at eliminating competition, can rarely be said to be so inherently destructive or so devoid of any discernible benefit that the courts must condemn the policy without exploring its effects or the underlying rationale. (Id. at 840-41; citation and footnote omitted)

The court finds this analysis to be most persuasive; moreover, it is compelling where, as here, plaintiff was a member of the trade association and his exclusion therefrom voluntary.[2]

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[2] The court pauses to note that it disagrees with the defendants' argument that application of the per se rule is foreclosed by statute, N.J.S.A. 56:9-5(2) provides:

> This act shall not forbid the existence of trade and provessional organizations created for the purpose of mutual help, and not having capital stock, nor forbid or restrain members of such organizations from lawfully carrying out the legitimate objects thereof not otherwise in violation of this act; nor shall those organizations or members per se be illegal combinations or conspiracies in restraint of trade under the provisions of this act.

A close reading of this section demonstrates that the organization as an entity must be viewed separately from its conduct. Thus, the act exempts the organization itself while mandating that the activities of its members may not be undertaken in violation of law. Furthermore, a per se approach may not be applied to the

(5) This brings the court to the question of whether mandated membership in the Monmouth County Board of Realtors (and the state and national associations) as a condition precedent to participation in the multiple listing service is a reasonable restraint of trade. Under the facts of this case, it clearly is not. Here the payment of dues is totally unrelated to the operation of the multiple listing service. Even members are required to pay an initiation fee of $500 which sum is designed to approximate the actual cost of providing the service. It is apparent, therefore, that board membership is surplusage. Undoubtedly, dues are used for purposes believed to advance the interests of the real estate industry as a whole, as for example, the litigation fund; however, the mutual benefit concept cannot be used to coerce a person to join what is designed to be a voluntary association. Lawyers are

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organization, although the doctrine may be applied to the activities of the organization where appropriate. See Oates v. Eastern Bergen Cty. Multiple Listing Service, Inc., supra, 113 N.J. Super, at 394. To construe the statute otherwise would require detailed judicial analysis of conduct which clearly invokes the per se rule, such as price fixing, a result not envisioned by the Legislature.

not compelled to join a county bar association and, should they choose to do so, they do not have to join a state or national bar association. Here, however, real estate brokers and salesmen must become members of the county board and the state and national associations in order to participate in the multiple listing service, despite the fact that membership and the payment of dues are unrelated to actual cost.

It is apparent, moreover, that no bona fide justification may be made in support of the reasonableness of the membership requirement. The short answer is that of the 35 multiple listing services surveyed by plaintiff, eight do not condition participation upon membership. Not only have certain segments of the industry recognized that the nexus between the local board and the multiple listing service is artificial, but in exclusion cases striking down restrictions upon membership the judicial relief afforded has encompassed complete elimination of any constraints upon nonmember access to the multiple listing service. E. G., Grillo v. Board of Realtors of Plainfield Area, supra, 91 N.J.

Super, at 229; Marin Cty. Board of Realtors, Inc. v. Palsson, supra, 549 P. 2d at 845.

Against this torrent of logic defendants have understandably grasped at a straw contained in Grillo where the court opined that

> * * * (i)f every licensed real estate broker in the Plainfield area could become a member of the Board for the asking, no nonmember would have cause for complaint about being excluded from the benefits of the multiple listing service. (91 N. J. Super, at 210)

That this statement stands four-square against plaintiff's position cannot be denied. But this apparent barrier is removed when it is acknowledged that the court in Grillo went on to grant nonmembers complete access to the multiple listing service furnished by the local board. In brief, the Grillo court itself recognized that a membership requirement needs a rational basis to find sustenance. Moreover, as plaintiff's survey points out, the local board which defended in Grillo is one of eight which does not presently require membership as a condition precedent to access to the multiple listing service.

For the foregoing reasons final judgment will be entered declaring that the

by-laws, rules and regulations of the Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service which limit participation in the service to members of the local board constitute an unlawful restraint of trade. The county board and its committee will be permanently enjoined from denying non-members of the board equal access to the multiple listing service.

As the foregoing declaratory and injunctive remedy affords plaintiff complete relief, the motions for summary judgment of the other named defendants will be granted. Since plaintiff waived at oral argument any claim for compensatory or punitive damages, jurisdiction will be retained solely for the purpose of determining the award of reasonable attorneys' fees and costs of suit pursuant to N.J.S.A. 56:9-10(b).

REPORTED AT 152 N. J. Super 100.

NEW JERSEY ANTITRUST ACT

N.J.S. 56:9-1 Short title

The Act may be known and shall be cited as the New Jersey Antitrust Act.

N.J.S. 56:9-2 Definitions

a. As used in this act, unless the context otherwise requires "person" shall mean any natural person or persons, or any corporation, partnership, company, trust or association of persons.

b. "Trade or commerce" shall include all economic activity involving or relating to any commodity or service.

c. "Commodity" shall mean any kind of real or personal property .

d. "Service" shall mean any activity which is performed in whole or in part for the purpose of financial gain, including but not limited to sale,

rental, leasing or licensing for use.

N.J.S. 56:9-3 Contracts and conbinations in restraint of trade

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. in this State, shall be unlawful.

N.J.S. 56:9-12 Treble damage suit

a. Any person who shall be injured in his business or property by reason of a violation of the provisions of this act may sue therefor and shall recover threefold the damates sustained by him, together with reasonable attorney's fees, filing fees and reasonable costs of suit. Reasonable costs of suit may include, but shall not be limited to the expenses of discovery and document reproduction.

b. The State and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section. The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law.

N.J.S. 56:9-18 Uniform construction

This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.

SHERMAN ANTITRUST ACT

15 USC I. Restraint of trade; resale price maintenance; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied

to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914 (15 USC 45): Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between

manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c.647, 1, 26 Stat. 209; Aug 17, 1937, c.690, Title VIII, 50 Stat. 693; July 7, 1955, c.281, 69 Stat.

282; Dec. 21, 1974, P.L. 93-528, 3, 88 Stat. 1708).

15 USC 15. Suits by persons injured; recovery of treble damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c.323 4, 38 Stat. 731)

Plaintiff	
WAYNE C. POMANOWSKI	SUPERIOR COU OF NEW JERSE
	CHANCERY DIVI MONMOUTH COUN
vs.	
Defendants	DOCKET NO.
MONMOUTH COUNTY BOARD OF REALTORS, A New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; and CHARLES DARRAH	C3479 76 CIVIL ACTION AFFIDAVIT

STATE OF NEW JERSEY)
COUNTY OF MONMOUTH) ss:

WAYNE C. POMANOWSKI, being of full age and duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff in the above-captioned matter and reside at Apartment 102D, White Street, Eatontown, Monmouth County, New Jersey.

2. I am a licensed real estate broker of the State of New Jersey and practice as such as the Thompson Agency, with offices at 43 Gilbert Street, North Tinton Falls, Monmouth County, New Jersey.

3. I had been a member of the Monmouth County Board of Realtors from approximately July of 1972 to March 31, 1977, at which time I did not renew my membership because I no longer wished to be a member of that organization.

4. I have been a member and participant in the Monmouth County Multiple Listing Service since approximately July of 1972 and had paid my membership fees up to December 31, 1977.

5. On April 1, 1977, I noticed that no listings were delivered to me by the Monmouth County Multiple Listing Service.

6. At approximately 1:30 p.m. on April 1, 1977, I visited the office of Monmouth County Multiple Listing Service to inquire as to why I had not received any listings on that day. No one at the office would give me an answer and referred me to Mr. William Kircher, who was the Executive Officer of the Multiple Listing Service.

7. Mr. Kircher informed me that as of April 1, 1977, I was no longer a member of the Monmouth County Multiple Listing Service because I was no longer a mem

of the Monmouth County Board of Realtors. He further advised me that my membership in both organizations was terminated on March 31, 1977 because I did not pay my dues to the Monmouth County Board of Realtors, even though my dues were paid in full for the Monmouth County Multiple Listing Service. Mr. Kircher also advised me that I would not be allowed to receive listings from the Monmouth County Multiple Listing Service for the above reason.

8. When I protested to Mr. Kircher of this decision, he placed a phone call to Mr. Charles Darrah, President of the Monmouth County Board of Realtors, who confirmed Mr. Kircher's decision that I could not receive listings from the Monmouth County Multiple Listing Service because I was not a member of the Monmouth County Board of Realtors.

9. I am currently being forced out of the real estate business because I have no inventory available because I no longer receive listings. I am unable to adequately service my clients because I am being denied vital real estate information which is needed to allow me to

complete my appraisal of values of real estate.

10. I have found it necessary to take out a $5,000.00 loan to finance my real estate office. This loan is rapidly being exhausted and I may be forced to close my real estate agency within the near future unless I receive relief from the Court.

11. I am presently being forced out of the real estate business because I decided not to be a member of a trade organization.

12. There is no other source for listings of available real estate in the area of Monmouth County in which I do business, except for the Monmouth County Multiple Listing Service.

13. It is my belief that a major portion of the real estate brokers in the Monmouth County area are members of the Monmouth County Board of Realtors and members of the Monmouth County Multiple Listing Service.

14. I make this affidavit in support of the Verified Complaint and Order to Show Cause with Temporary Restraints.

/s/ Wayne C. Pomanowski
WAYNE C. POMANOWSKI

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WAYNE C. POMANOWSKI,

Petitioner,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, a New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; CHARLES DARRAH,

Respondents.

Brief and Appendix on Behalf of Respondents Monmouth County Board of Realtors and Monmouth County Multiple Listing Service in Opposition to Petition for Certiorari to the Supreme Court of New Jersey

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RICHARD H. MILLS
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QUESTIONS PRESENTED

1. Does the New Jersey Supreme Court's interpretation of the New Jersey Antitrust Act raise a federal question giving the United States Supreme Court jurisdiction pursuant to 28 U.S.C. 1257(3)?

2. May petitioner assert before this Court a claim under the Commerce Clause of the United States Constitution when that claim was neither raised nor considered below?

3. May petitioner assert a federal Constitutional "right of nonassociation" when that claim was neither raised nor considered below?

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I

COUNTERSTATEMENT OF FACTS

This case arises out of a decision by the New Jersey Supreme Court construing the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.* The specific issue raised in the New Jersey state courts was whether respondent trade association[1] may, without violating the New Jersey statute, limit participation in its multiple listing service[2] to association members, where membership is readily available to all licensed real estate brokers. Petitioner Pomanowski had been a member of the association and a participant in the listing service, but he voluntarily terminated his membership and thereby automatically surrendered his eligibility to participate in the service. Although it has always been open to him to reinstate his membership, he chose instead to challenge the membership rule under the New Jersey statute. In the decision below[3] the Supreme Court of New Jersey endorsed the reasonableness of the membership requirement and held that it did not violate the state Act. Petitioner now asks

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1. The Monmouth County Board of Realtors ("MCBR").

2. The Monmouth County Multiple Listing Service ("MCMLS"). Functioning as a committee of the MCBR, the MCMLS serves to make a broad range of property listings and listing information available to those MCBR members who participate in the service. Thus, a broker-participant in the MCMLS may enter into an agreement with a property owner whereby the owner retains the broker as his agent to list the property for sale or exchange. The broker may then submit that listing to the MCMLS, which in turn disseminates it to other participating brokers who are, in effect, solicited by the listing broker to act as sub-agents to sell or exchange the property. If an MCMLS participant thereafter brings about a sale or exchange of the property, the listing and selling brokers divide the brokerage commission on terms agreed upon between themselves.

3. 89 N.J. 306, 446 A.2d 83 (1982), reproduced at petitioner's appendix ("P.A.") 1 to 31.

this Court to grant certiorari of the case, alleging for the first time the existence of federal questions.

The balance of the pertinent facts are set forth in detail in the decision of the New Jersey Supreme Court and need not be repeated here.

ARGUMENT

Point I

This Court lacks jurisdiction to review the New Jersey Supreme Court's interpretation of the New Jersey Antitrust Act because there is no federal question present.

In Point II of the certiorari Petition it is argued that the Supreme Court of the United States has jurisdiction of this matter for the purpose of "giving direction" to the New Jersey Supreme Court concerning the correct application of "prevailing federal opinions" on the antitrust question decided by the state court. Petition, p. 15. Several interrelated arguments are advanced in support of this contention.

Petitioner suggests initially that in reaching its decision the New Jersey Supreme Court "deemed" a federal question to be before it and that it decided that question adversely to the federal right being asserted, with the result that this Court has jurisdiction under *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) and *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Petition, p. 17.

Orr and *Prouse* were both cases in which the state courts expressly decided questions of federal law. Those cases therefore lack even colorable application to the present matter: the New Jersey Supreme Court did not anywhere intimate in its opinion that it considered a federal question to be before it, or that it was in fact undertaking to decide a federal question. Rather, the opening paragraph of its opinion states the issue to be "whether [the membership requirement here in issue] constitutes a violation of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 to -19" (P.A. 1 to 2). To be sure, in Section II of the opinion the court recognized that federal decisions under the Sherman Act constitute "aids in

the determination of the antitrust implications of [business arrangements such as those here in question] in the light of our relatively new Antitrust Act, *N.J.S.A.* 56:9-1 to -19." (P.A. 8), and it went on to say (P.A. 9 to 10) that the federal cases and other state court cases "are useful in developing an analytical framework" within which to decide the state-law question of compliance with the New Jersey Antitrust Act. Its decision of the case, however, was cast unequivocally as one of state rather than federal law:

> [W]e conclude that in conditioning MCMLS access on MCBR membership, defendants have created a reasonable restraint of trade—one not in violation of *our* Antitrust Act.

P.A. 28 (emphasis added).

Thus, the organization and language of the opinion of the New Jersey Supreme Court show plainly that it was basing its conclusion *solely* upon state law. Under those circumstances, this Court lacks jurisdiction to review the New Jersey Supreme Court's determination. 28 U.S.C. 1257(3); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965).

Petitioner attempts to avoid the New Jersey Supreme Court's express and exclusive reliance upon the New Jersey Act by invoking *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) for the idea that "where a state court is guided by Federal interpretation of parallel Federal laws in interpreting its own state law and [the state court] fails to understand such Federal consideration," the Supreme Court of the United States has jurisdiction "to correct" the state court. Petition, pp. 19 to 20.

Petitioner has misstated the principle which underlay the *Zacchini* decision. That case and others like it[4] stand for the proposition that where a state court construing a state law or constitutional provision acts under a perceived compulsion of federal law but misinterprets the federal rule, this Court may exercise jurisdiction, declare the true state of the federal law, and remand the matter in order that the state court may be relieved of the compulsion and proceed to decide the issue solely as a matter of local law.

In *Zacchini* itself an entertainer sued a broadcasting company for damages arising out of the unauthorized videotaping and subsequent public broadcasting of petitioner's "human cannonball" act. The Ohio Supreme Court gave judgment for the broadcasting company upon a finding that its use of the videotape was privileged under the First and Fourteenth Amendments of the United States Constitution, *see* 433 U.S. at 565-66.

The Supreme Court of the United States held that the decision of the Ohio Supreme Court was based solely on federal grounds, 433 U.S. at 568. The Court went on to say, however, that even if the decision of the state court were understood as ultimately resting on Ohio law,

> it appears that at the very least the Ohio court felt *compelled* by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amend-

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4. *See, e.g., United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-631, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973); *State Tax Commission v. Van Cott*, 306 U.S. 511, 514-515, 59 S.Ct. 605, 83 L.Ed. 950 (1939); and *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924).

> ments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. If the Supreme Court of Ohio "held as it did because it felt under *compulsion* of Federal law as enunciated by this Court so to hold, it should be relieved of that *compulsion*. It should be freed to decide . . . these suits according to its own local law." *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5, 71 S.Ct. 1, 95 L.Ed. 3 (1950).

433 U.S. at 568 (citation omitted; emphasis added).

Similarly, in *State Tax Commission of Utah v. Van Cott*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939), this Court undertook to review a decision of the Utah Supreme Court because the state court's "opinion as a whole shows that the court felt *constrained* to conclude as it did because of the Federal Constitution and this Court's prior adjudications of constitutional immunity," 306 U.S. at 514 (emphasis added). In *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924), the Court premised its *certiorari* jurisdiction upon the determination that the New York court had reached a certain state-law conclusion "because it thought the federal Constitution *required* such action." 264 U.S. at 120 (emphasis added). And in *United Airlines v. Mahin*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973), jurisdiction was based upon the fact that two justices of the Illinois Supreme Court—justices possessed of the "swing" votes—had considered themselves bound by the federal Constitution and by a decision of the Supreme Court of the United States to reach a given result with respect to a state taxation question. 410 U.S. at 630-31.[5]

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5. *Cf. St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981), a decision which is something of a hybrid between *Orr v. Orr*, *supra*, and *Zacchini v. Scripps-Howard Broadcasting Co.*, *supra*. The case had to do with

The state-court decision in the case at bar stands in stark contrast to *Zacchini* and the other cases discussed *supra*. There is no suggestion in the opinion of the New Jersey Supreme Court that it felt itself "compelled" by federal legislation or federal court decisions to reach the conclusion it did on the merits of this matter. Instead, it plainly appears that that court relied upon federal antitrust cases only for the limited purpose of "developing an analytical framework" within which to address, as a matter of state law, the antitrust question before it. P.A.9. To that end, it employed *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), and other

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the imposition of unemployment compensation taxes under the Federal Unemployment Tax Act (FUTA) and South Dakota's complementary tax statute.

According to the opinions of this Court and of the South Dakota Supreme Court, FUTA permitted credits against the federal unemployment tax for employers who had paid money into federally approved state unemployment tax funds. In order for a state to participate in the federal plan it had to meet certain requirements set out in FUTA.

The plaintiffs were exempt from the federal tax by virtue of their status as charitable organizations. Other provisions of FUTA, however, required participating states to tax certain charitable organizations exempted from the direct federal tax. The central issue presented by the case was whether plaintiffs were exempt, under yet other sections of the South Dakota statute and its federal analog, from that federally-mandated but state-imposed tax upon charitable organizations. *See St. Martin Lutheran Church v. South Dakota*, *supra*, 451 U.S. at 775-77; and *Matter of Northwestern Lutheran Academy*, 290 N.W.2d 845, 846-47 (S.Dak. S.Ct., 1980).

Just as it had done in *Orr v. Orr*, *supra*, this Court found jurisdiction to review the South Dakota Supreme Court's denial of the exemption in the fact that the state court had based its conclusion entirely upon federal law, and not upon any independent and adequate state ground. 451 U.S. at 780, fn.9. With a further reference to *Zacchini* and its predecessors, the Court also undertook to free the state court thereafter to interpret its own law as it saw fit, unfettered by any perceived federal compulsion to reach a given result. *Id.*

landmark federal (and New Jersey[6]) decisions to establish the basic parameters of a "rule of reason" analysis. Its application of those parameters to the facts of the case, however, was not in any sense dictated or compelled by federal decisions arising in the same (or even a similar) context as the one before the court. On the contrary, the New Jersey Supreme Court pointedly refused to base its decision upon several federal decisions cited by respondent MCBR,[7] and it chose instead (P.A. 22 to 28) to rest its determination upon prior state-law rulings arising in New Jersey (*Grillo v. Board of Realtors of Plainfield Area*, 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966) and *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*, 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971)); in Illinois (*Blake v. H-F Group Multiple Listing Service*, 36 Ill.App. 3d 730, 345 N.E.2d 18 (App. Ct. 1976)); in Maryland (*Grempler v. Multiple Listing Bureau, Inc.*, 258 Md. 419, 266 A.2d 1, 45 A.L.R.3d 180 (Ct. App. 1970)); in Pennsylvania (*Collins v. Main Line Board of Realtors*, 452 Pa. 342, 304 A.2d 493 (Sup. Ct.), *cert. den.* 414 U.S. 979 (1973)); in California (*Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 130 Cal. Rptr. 1, 54 P.2d 833 (1976)); and in Iowa (*State v. Cedar Rapids Board of Realtors*, 300 N.W.2d 127 (Iowa S.Ct. 1981)).

In the absence of a perceived federal compulsion, there exists no basis here for the exercise of federal question jurisdiction under *Zacchini* or any of the other decisions by this Court. Petitioner cannot alter this result by

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6. *State v. Lawn King, Inc.*, 84 N.J. 179, 417 A.2d 1025 (1980).

7. *Brown v. Indianapolis Board of Realtors*, 1977-1 Trade Cases, para. 61,435 p. 71,611 (S.D. Ind. 1977), *Martin-Trigona v. National Association of Realtors, et al.*, 1978-1 Trade Cases, para. 61,915 p. 73,872 (E.D. Ill. 1978), and *Murphy et al. v. Alpha Realty, Inc., et al.*, 1978-2 Trade Cases, para. 62,388 (N.D. Ill. 1978).

pointing, at pp. 15 through 19 of his Petition, to the fact that the New Jersey Antitrust Act includes a provision (*N.J.S.* 56:9-18) which states that the statute "shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practical, a uniformity in the laws of those states which enact it." The proper construction of that language is itself a question of state law, to be decided exclusively by the state court, and no federal question is raised by the mere presence of that provision in the state enactment. *Miller's Executors v. Swann*, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893).

In the present case the New Jersey Supreme Court undertook to construe, as a matter of state law, the "ruling judicial interpretations" language contained in the New Jersey Act. *See* P.A. 8 to 10. The court made it clear that it did not regard the quoted phrase as a general mandate to defer to federal court decisions addressing even substantially identical facts under the Sherman Act: the court expressly declined (at P.A. 9) to treat as "ruling judicial interpretations" several federal district court opinions cited by the MCBR which were squarely on point,[8] and it found no occasion to consider whether it would be bound even by a decision of the Supreme Court of the United States, P.A. 8 to 9. Thus, it characterized federal decisions as nothing more than "persuasive authority" (P.A. 8, *quoting* its own opinion in *State v. Lawn King, supra*) and a "respected source of instruction," P.A. 9, f.n. 3. Those descriptions fall well short of establishing federal-question jurisdiction under 28 U.S.C. 1257 (3), *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920 (1940), *State Tax Commission of Utah v. Van Cott*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939), and this Petition for Certiorari should therefore be denied.

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8. See cases cited at f.n. 17, *supra*.

Point II

Petitioner may not assert his Commerce Clause argument here because it was neither raised nor considered below.

Point I of the Petition seeks to state a claim under the Commerce Clause of the United States Constitution, Art. I, Sec. 8, para. 3. Nowhere in the Petition, however, has any attempt been made to comply in connection with that claim with the requirements of Supreme Court Rule 21.1(h). That rule provides in pertinent part:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The effort at compliance with Rule has not been made because compliance is impossible: in the state courts this case was pleaded, tried, briefed, argued, and decided solely under the New Jersey Antitrust Act, and at no time prior to the filing of the Petition was it so much as hinted that petitioner wished to assert a claim under the Commerce Clause.[9]

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9. *See* petitioner's Amended Verified Complaint (R.A. 1 to 7), petitioner's Pretrial Memorandum submitted below (R.A. 8 to 11); and tables of contents from petitioner's trial brief (R.A. 30 to 32) and brief on appeal below (R.A. 37 to 40). And because the interstate-commerce question was never raised by petitioner in the state-court

Petitioner seeks belatedly to inject the interstate commerce issue at this point by including in his Petition asserted "facts" which are not contained in the record below. For example, he states at page 12 of the Petition (and again at page 21) that the Realtor organization "controls and precludes" non-Realtors in 27 of a total of 35 multiple listing services which he says operate in the State of New Jersey. He includes no record citation for this statement, nor could he: there was no proof at trial even of the total number of multiple listing services functioning in the state, much less of facts which would support petitioner's opinion that non-Realtors are "controlled and precluded" in a large number of such services.

Similarly, petitioner invokes in aid of his interstate commerce claim the spectre of a "nationwide plan" on the part of the Realtor organization "to exclude all non trade association members from intrastate and interstate commerce," page 12 of Petition. Again, no record citation is offered, for the simple reason that this proposition was not even touched upon at trial.

In addition to improper factual recitals, petitioner attempts to legitimize his Commerce Clause argument with *non sequiturs* ("One must inescapably conclude that with 75 percent control[10] of the MLS in the State of New Jersey, interstate commerce is affected," Petition, page 21), and rhetorical questions ("Can one possibly conclude that in all of these transactions within these Realtor controlled MLS not one person sold his house to

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proceedings, neither the opinion of the trial judge (P.A. 32 to 46) nor that of the New Jersey Supreme Court (P.A. 1 to 31) made any reference to that issue.

10. A percentage evidently based upon the non-facts alluded to earlier in the text, concerning alleged Realtor control of 27 multiple listing services out of an alleged total of 35 in the State of New Jersey.

move to another state; not one title company did business in another state; not one bank had multi-state affiliations?" *Id.*)

Finally, petitioner finds proof of interstate commerce in this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), wherein (he says) it was "held that real estate brokers are involved in the interstate commerce process." Petition, pp. 20 to 21. In fact, however, *McLain* held no more than that the petitioners had made out a sufficient showing of activity-within-interstate-commerce as to preclude the dismissal, on jurisdictional grounds, of a complaint alleging violations of the Sherman Act. The Court reached this decision only after a detailed review of affidavits and depositions which focused specifically upon the interstate effects of commercial activity in the New Orleans area by the defendant Real Estate Board. 444 U.S. at 236-39. *McLain* did not at all purport to be a final determination on the question whether the respondents there were engaged in interstate commerce or whether their activities had a substantial effect on interstate commerce, since those matters would have to be determined after a full plenary hearing at which both sides might present evidence bearing on those questions. 444 U.S. at 245. In any event, there is nothing in the opinion to suggest that the interstate commerce aspects of the activity of the New Orleans Real Estate Board can be generalized to the real estate industry as a whole, or to the MCBR in particular. In fact, *McLain* affirmatively states that no such general assumption can be made, and that activity-within-interstate-commerce must in each case be pleaded and, if those pleadings be denied, must be proven. 444 U.S. at 242. Thus, *McLain* cannot cure for petitioner his failure to have asserted or to have proved his Commerce Clause arguments in the New Jersey courts.

In short, petitioner is attempting to rely here upon a federal question which was neither raised nor decided below, and which finds no factual support in the record. This Court has steadfastly and emphatically refused to entertain federal questions which are raised *ab initio* in this forum. *Tacon v. State of Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Monks v. New Jersey*, 398 U.S. 71, 89 S.Ct. 1563, 26 L.Ed.2d 54 (1970); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398(1969); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *Lynch v. New York el rel. Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934); *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277 (1927). That principle is a salutary one, and it should be applied here to bar petitioner's Commerce Clause claims.

Point III

Petitioner may not assert a constitutional right of "non-association" here because it was neither raised nor considered below.

Point III of the Petition seeks to raise as a federal question the proposition that the business activities of the respondent Board infringed upon an alleged "freedom of nonassociation" guaranteed to petitioner by the First and Fourteenth Amendments of the United States Constitution. Petitioner acknowledges (at pages 22 and 23) that this question was never discussed by the state courts, but he declares that the record will show that he did in fact raise the issue before those tribunals.

Just as was true of his Commerce Clause argument, however, petitioner has made no effort to comply with the requirement of Supreme Court Rule 21.1(h) that he identify precisely where it was in the record below that the federal question was asserted. Again, the reason he

does not make that effort is because compliance is beyond his reach: the question was neither pleaded nor briefed below, it was not the object of any evidence at trial, and it received no mention whatever in the opinions of the trial judge or of the New Jersey Supreme Court.

As is indicated in petitioner's statement of facts, this case was twice the subject of appellate proceedings. The first appeal followed the granting of summary judgment in favor of the petitioner, and resulted in the reversal of that judgment by the Appellate Division of the New Jersey Superior Court and the remanding of the case for a plenary trial. *See* P.A. 47 to 53. During the course of those appellate proceedings the issue of "freedom of non-association" was raised—for the first time—not by petitioner but by an *amicus curiae*, the New Jersey Attorney General. In its remand order the Appellate Division declared that it need not and should not reach that question since it "was not raised or argued below," P.A. 53. The Appellate Division left open the door for the submission of proofs on the issue at trial, however:

> To the extent this alleged right may reflect policy considerations which might affect a rule of reason determination, the trial judge may choose to consider it on the remand.

P.A. 53.

Despite that clear invitation by the appellate court, neither the petitioner nor the *amicus curiae* who had raised the issue in the first place made any effort on remand or on the second appeal to assert this alleged Constitutional right.[11]

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11. *See* the following documents, copies of all of which are reproduced in respondent's appendix: petitioner's Pretrial Memorandum, submitted to trial court in advance of plenary hearing (R.A. 8 to 11); Pretrial Memorandum of *amicus curiae* New Jersey Attorney

Under all of these circumstances, petitioner is foreclosed from asserting this federal Constitutional argument for the first time before the Supreme Court of the United States. *See Cardinale v. Louisiana*, and the numerous additional cases cited in Point II, *supra*.

General (R.A. 12 to 17); Pretrial Order entered by trial judge on December 17, 1979, including factual and legal contentions of all parties and *amici* (R.A. 18 to 29); tables of contents from trial brief submitted by petitioner (R.A. 30 to 32) and the New Jersey Attorney General (R.A. 33 to 26) prior to plenary hearing; and tables of contents from briefs submitted by petitioner (R.A. 37 to 40) and New Jersey Attorney General (R.A. 41 to 44) upon second appeal in the New Jersey courts.

CONCLUSION

For the above reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LAUTMAN, RAPSON,
HENDERSON & MILLS
Attorneys for Respondents,
Monmouth County
Board of Realtors
and Monmouth County Multiple
Listing Service

By: /s/ C. Keith Henderson
C. KEITH HENDERSON

SUPERIOR COURT OF NEW JERSEY

DOCKET No. C 3479-76

WAYNE C. POMANOWSKI,

Plaintiff,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, A New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER, and CHARLES DARRAH,

Defendants.

CIVIL ACTION

AMENDED VERIFIED COMPLAINT

The plaintiff, Wayne C. Pomanowski, residing at Apartment 102D, White Street, Eatontown, Monmouth County, New Jersey, by way of complaint against defendants, says:

1. Plaintiff, Wayne C. Pomanowski, is a real estate broker, licensed as such under the laws of New Jersey, and is engaged in the real estate brokerage business under the name of Thompson Agency, located at 43 Gilbert Street North, Tinton Falls, Monmouth County, New Jersey.

2. Defendant Monmouth County Board of Realtors, hereinafter referred to as Board of Realtors, is a New Jersey Corporation, located at 157 Paterson Avenue, Shrewsbury, Monmouth County, New Jersey. The defendant Board of Realtors is a trade organization comprised of real estate brokers in the Monmouth County area and is one of the largest such county organizations

in the State of New Jersey with more than 260 broker members and more than 1,400 associate members comprised of sales persons. The defendant Board of Realtors is a member of the New Jersey Association of Realtors and the National Association of Realtors.

3. Defendant Monmouth County Multiple Listing Service, hereinafter referred to as M.L.S., is a Committee of defendant Board of Realtors, and located at 157 Paterson Avenue, Shrewsbury, Monmouth County, New Jersey. Its function is to receive listings from its members on real estate located in the Monmouth County area, and to disseminate that listing information to its members. It is primarily a co-operative sales device through which real estate may be merchandised efficiently and expeditiously to the greater advantage of sellers, buyers, and the participating real estate brokers.

4. Defendant William G. Kircher, residing at 70 Salem Lane, Little Silver, Monmouth County, New Jersey, was at all times herein referred to, the Executive Officer for the Monmouth County Board of Realtors and in charge of the M.L.S. William G. Kircher is named as a party defendant in that he, acting either within or without his capacity as Executive Officer, advised plaintiff that plaintiff was no longer a member of the defendant M.L.S. and was no longer entitled to the listings of said defendant M.L.S.

5. Defendant, Charles Darrah, residing at 70 Samara Drive, Shrewsbury, Monmouth County, New Jersey, was at all times herein referred to, President of the Monmouth County Board of Realtors. Charles Darrah is named as a party defendant because he, either acting in his individual capacity or as President of the Board of Realtors, advised plaintiff that plaintiff was not entitled to listings from defendant M.L.S. because plaintiff was no longer a member of defendant Board of Realtors.

6. Plaintiff was a member of the defendant Board of Realtors from approximately July of 1972 to March 31, 1977, at which time he decided to terminate his membership therein by not paying the next year's membership dues for himself and his sales persons in the amount of $250.00. However, plaintiff did wish to continue his membership in defendant M.L.S. and had paid his service fees throughout March 31, 1977 and would continue to pay such fees if allowed to participate in defendant M.L.S.

7. Plaintiff had been a member of defendant M.L.S. from July of 1972. Plaintiff had paid his membership fees in the defendant M.L.S. up to March 31, 1977 and wishes to continue his membership in defendant M.L.S. and is ready, willing, and able to pay his membership and service fees in defendant M.L.S.

8. Beginning on or about April 1, 1977 and continuing to this date, plaintiff has been wrongfully denied listings of available real estate in the Monmouth County area, which are compiled and distributed by defendant M.L.S. because plaintiff's membership in defendant M.L.S. was wrongfully terminated by defendants because plaintiff was no longer a member of the defendant Board of Realtors. Plaintiff was not billed for his membership and service fees in defendant M.L.S. after March 31, 1977. Plaintiff is ready, willing, and able to pay his membership and service fees in defendant M.L.S. and desires to continue such membership.

9. Although plaintiff was an active member and participant of defendant M.L.S. and has paid his membership dues up through March 31, 1977, he was denied listings beginning on or about April 1, 1977, and was advised by defendant Kircher that since plaintiff was no longer a member of the defendant Board of Realtors, then he could no longer be a member of the defendant

M.L.S., even though he was willing to pay his membership fees, and therefore was not entitled to receive listings from the defendant M.L.S.

10. On or about April 1, 1977, defendant Darrah confirmed that plaintiff would not be allowed to receive listings from defendant M.L.S. because plaintiff was not a member of defendant Board of Realtors.

11. Plaintiff is a real estate broker in Monmouth County, and knowledge of listings of available real estate in this area is an integral and necessary element of plaintiff's real estate brokerage business in that knowledge of available property is a real estate broker's stock and trade.

12. Defendant M.L.S. is the only source of real estate listings in the area of Monmouth County in which plaintiff practices his business.

13. The constitution, by-laws, rules, regulations, and/or actions of defendant Board of Realtors and defendant M.L.S. wrongfully deny to plaintiff, as well as real estate brokers and sales persons who are not members of defendant Board of Realtors, access to listings of real estate available in the Monmouth County area which are only available from defendant M.L.S. and are unlawfully in restraint of trade and commerce in this State and violative of the provisions of *N.J.S.A.* 46:9-3 and *N.J.S.A.* 56:9-4.

14. The defendants, by their exclusion of plaintiff, as well as other non-members of the defendant Board of Realtors, from benefits of the multiple listing system have unlawfully combined, contracted, and/or conspired in restraint of trade, *to wit*, the real estate business, in violation of *N.J.S.A.* 56:9-3.

15. The defendants, by their exclusion of plaintiff and the non-members of defendant Board of Realtors from

the benefits of the multiple listing system, have unlawfully combined or conspired to and/or have monopolized trade and commerce, *to wit*: the real estate business in the Monmouth County area in violation of *N.J.S.A.* 56:9-4.

16. As a result of defendants' unlawful activities in restraining trade and commerce as alleged and in defendants' denying plaintiff access to the listings of available real estate in the Monmouth County area through defendant M.L.S., plaintiff has lost and will constantly lose business and profits and has and will sustain injury to business, profits and livelihood, and is entitled to damage for such injury as well as treble damages, pursuant to *N.J.S.A.* 56:9-12.

17. Upon information and belief, the defendants, unless restrained, will continue their activities alleged above and will wrongfully continue to deny plaintiff listings of available real estate in the Monmouth County area which will prevent plaintiff from pursuing his activity as a real estate broker, will cause plaintiff to lose business, profits and customers, and damage his reputation as a real estate broker, and will drive plaintiff out of business, and, thus, plaintiff is entitled to injunctive relief against the threatened loss of his business through defendants' activities both under the general equity power of the Courts and under the provisions of *N.J.S.A.* 56:9-10.

18. The defendant New Jersey Association of Realtors and the defendant National Association of Realtors are named as necessary parties in that a portion of the dues payable to defendant Boards of Realtors is earmarked for their use and the defendant Boards of Realtors operate under the constitution and by-laws of the National Association of Realtors and New Jersey Association of Realtors.

19. The plaintiff has no other adequate remedy than relief from this Court.

WHEREFORE, plaintiff demands judgment against defendants jointly, severally, or in the alternative,

A. Declaring that Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service an unlawful combination in restraint of trade and/or an unlawful monopoly on the real estate business in Monmouth County.

B. Declaring that the constitution, by-laws, regulations, rules, activities, and practices of the Monmouth County Board of Realtors, and Monmouth County Multiple Listing Service (as well as the National Association of Realtors and New Jersey Association of Realtors, if such relief be deemed necessary) relating to limiting members of the Monmouth County Multiple Listing Service to members of the Monmouth County Board of Realtors and denying others access to the benefits of the multiple listing service an unlawful combination in restraint of trade and contrary to public policy and invalid.

C. Permanently restraining defendants from denying plaintiff membership in the Monmouth County Multiple Listing Service and from denying plaintiff access to the listings of the listings of the Monmouth County Multiple Listing Service.

D. Damages for loss of profits and for injury to his business.

E. Punitive damages.

F. Treble damages in accordance with the provisions of *N.J.S.A.* 57:9-12.

G. Attorneys' fees and costs of the suit.

H. Such other relief as the Court may deem equitable.

ORGAN & STRAWINSKI, Esqs.,
Attorneys for Plaintiff,

By: /s/ Frederick A. Organ
FREDERICK A. ORGAN

CERTIFICATION OF VERIFICATION

I am the plaintiff in the foregoing amended complaint. The allegations of the foregoing amended complaint are true to the best of my knowledge, information, and belief.

I certify that the foregoing statements made by me are true to the best of my knowledge, information, and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Wayne C. Pomanowski
WAYNE C. POMANOWSKI

PRETRIAL MEMORANDUM OF WAYNE C. POMANOWSKI

1. Nature of Action: Action brought under the New Jersey Anti-Trust Act (N.J.S.A. 56:9-1 et seq.) seeking to declare defendants actions in restricting membership in the Monmouth County Multiple Listing Service to members of the Monmouth County Board of Realtors (as well as the State and National Association of Realtors) and*

2. Admissions and Stipulations: None as of filing of this pretrial memorandum.

3-4. Factual and Legal Contentions: (Annexed hereto).

5. Damage and Injury Claims: Plaintiff seeks injunctive relief together with an award for attorney fees. Claim for damages was waived at original hearing of this matter.

6. Amendments: None.

7. Legal Issues and Evidence Problems: See Attached.

8. Legal Issues Abandoned:

9. Exhibits: See Attached.

10. Expert Witnesses: See Attached.

11. Briefs: Pursuant to Court Order submission of Appellate Division and Supreme Court briefs.

12. Order of Opening and Closing: Usual, subject to placement of amicus curiae.

13. Any Other Matters Agreed Upon: None as of date of submission of pretrial memorandum.

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*excluding plaintiff as a non member, a violation of the State Anti-Trust Act.

14. Trial Counsel: Paul V. Strawinski and Frederick A. Organ

15. Estimated Length of Trial: One to two weeks.

16. Weekly Call or Trial Date: Pursuant to Court Order.

17. Attorneys for Parties Conferred on Numerous occasions. Matters Then Agreed Upon: None as of this time.

18. It is hereby certified that all pretrial discovery has been completed. Except Defendants have not answered interrogatories served upon them.

19. Parties Who Have Not Been Served: None.
Parties Who Have Defaulted: None.

ORGAN & STRAWINSKI, ESQS.
ATTORNEYS FOR PLAINTIFF

/s/ Paul V. Strawinski
PAUL V. STRAWINSKI

Dated: October 9, 1979

3. FACTUAL CONTENTIONS

A. Plaintiff was denied access to Monmouth County Multiple Listing Service (MCMLS) because he terminated his membership in the Monmouth County Board of Realtors (MCBR) (as well as the New Jersey and National Association of Realtors).

B. Access to the MCMLS is vital for plaintiff to operate his real estate brokerage business. Access to the MCMLS listings is his stock and trade.

C. The MCMLS controls a great percentage (approaching 80%) of the listings of properties listed for sale in the area of Monmouth County that plaintiff practices in.

D. A great percentage (approaching 90%) of the brokerage firms or agencies in the area where plaintiff practices, belong to and participate in the MCMLS.

E. The MCMLS is the only multiple listing service that operates in the basic geographic area of Monmouth County where plaintiff practices.

F. The MCMLS is not simply a club activity but rather it is an integral part of the real estate business in Monmouth County.

G. A Multiple Listing Service receives listings from members on real estate located in its jurisdictional area and disseminates thes listings to all its members. It allows each listing to reach a wide market and also supplies the members with a large inventory of available properties. It is a cooperative sales device through which real estate may be merchandised efficiently and expeditiously to the greater advantages of sellers, buyers, and participating real estate brokers.

7. LEGAL ISSUES

A. Can membership in a county board of Realtors, even where open to all licensed real estate brokers and salesmen, be made a condition precedent to participation in the board's multiple listing service without offending the New Jersey Antitrust Act NJSA 56:9-1 et seq.?

B. Are the defendants actions, in excluding plaintiff from the MCMLS simply because he is not a member and does not want to be a member of the MCBR, violation of the New Jersey Antitrust Act under the rule of reason test as applied to antitrust cases?

C. If plaintiff prevails, is he entitled to an award of attorney's fees and costs?

8. EVIDENCE PROBLEMS

May the New Jersey Attorney General, Anti-Trust Section, submit their findings as to data and statutes relating to market share and number of brokers controlled by the MCBR and MCMLS?

9. EXHIBITS

A. Data as to Market Share of Monmouth County Multiple Listing Service.

B. Data as to Membership of Monmouth County Multiple Listing Service and Monmouth County Board of Realtors.

C. Records or data of New Jersey Real Estate Commission as to complaints.

D. Comparison of facts of case to other antitrust cases involving access to Multiple Listing Services.

10. EXPERT WITNESSES

A. William Trombetta, D.A.G. or a member of his staff as to data compiled as to Multiple Listing Services.

B. Harold Howard, Esq. of California Bar. Participated in cases involving antitrust issues applied to Multiple Listing Services.

C. Victor Milmed, former member of MCMLS committee.

PRE-TRIAL MEMORANDUM OF NEW JERSEY ATTORNEY GENERAL, AMICUS CURIAE

1. NATURE OF ACTION: This is an action pursuant to *N.J.S.A.* 56:9-3 where the plaintiff seeks access to the Monmouth County Multiple Listing Service. However, as a condition of access to the Multiple Listing Service, the defendant Monmouth County Board of Realtors requires the plaintiff to join the Board of Realtors. The Attorney General of New Jersey seeks to establish that such requirement is an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

2. ADMISSIONS OR STIPULATIONS OF THE PARTIES: At this time, none have been arrived at.

3-4. FACTUAL AND LEGAL CONTENTIONS: See attached.

5. DAMAGE AND INJURY CLAIMS: See Plaintiff's Pre-trial Memorandum.

6. AMENDMENTS: None.

7. LEGAL ISSUES AND EVIDENCE PROBLEMS:

a. Legal Issues: Whether conditioning access to the Monmouth County Multiple Listing Service on joining the Monmouth County Board of Realtors is an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

b. Evidence Problems: The Attorney General will seek to have admitted into evidence data and summaries of data bearing on market share analysis and the validity of defendant's claim that adherence to the Realtor Code of Ethics results in significant inprovement in ethics and competence in the real estate transaction process, particularly with respect to consumers. Specifically,

such data were gathered from New Jersey Real Estate Commission complaint files for the year 1977 (Public Records), New Jersey Department of Taxation data on residential real estate sales by county and town for the years 1975 through 1977 (Public Records), subpoenaed business records from all multiple listing services throughout the State including residential real estate sales data and complaints, grievances and arbitrations for the period 1973 through 1977 (Business Records), residential real estate sales data testified to by executive officers of the multiple listing services throughout the State (Civil Investigative Demands issued in 1979), and 1978 Monmouth County Telephone Book Yellow Pages.

If no objection is made to any such data prior to trial, the same should be admitted without formal foundation proof but subject only to objection as to relevance.

8. LEGAL ISSUES ABANDONED: None.

9. LIST OF EXHIBITS: Subject to the possible evidentiary problems noted in §7b, the Attorney General seeks to introduce the following as exhibits:

a) Market Share accounted for by Monmouth County MLS.

b) Monmouth County MLS Charter indicating its territorial jurisdiction.

c) Information format used to collect data from the New Jersey Real Estate Commission Complaint files for 1977.

d) Total number of New Jersey Real Estate Commission complaints for 1977 apportioned between Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services.

e) New Jersey Real Estate Commission complaints for 1977 broken down by Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services further broken down by whether source of complaint was a licensed real estate person or a consumer.

f) The same format and approach as in §9(d) and (e) but applied to complaints, grievances and arbitrations derived from subpoenaed business records of selected multiple listing services and Realtor Boards as part of the State-wide real estate investigation being conducted by the Attorney General.

g) Complaints resolved from the subpoenaed business records noted in §9(f).

h) Number of real estate brokerage firms doing business in Monmouth County Multiple Listing Service territorial jurisdiction who participate in the Monmouth County Multiple Listing Service.

10. EXPERT TESTIMONY: See Plaintiff's Pre-Trial Memorandum.

11. FILING OF BRIEFS: As directed by the Court.

12. ORDER OF OPENING AND CLOSING: Usual.

13. MATTERS AGREED UPON: None.

14. COUNSEL: William L. Trombetta, Deputy Attorney General.

15. LENGTH OF TRIAL: One day for Amicus Curiae.

16. WEEKLY CALL DATE: As directed by Court.

17. PREVIOUS CONFERENCE DATES: The attorneys have not conferred.

18. DISCOVERY: There may be need for further discovery if the parties cannot agree or stipulate to the

market share accounted for by the Monmouth County Multiple Listing Service, particularly the breakdown of residential real estate sales volume between sales made within the chartered territorial jurisdiction of the Monmouth County Multiple Listing Service and those sales made outside its chartered territorial jurisdiction.

19. DEFAULTING PARTIES AND PARTIES NOT SERVED: The amicus curiae has no knowledge of any parties which have not been served or have defaulted.

3-4. FACTUAL AND LEGAL CONTENTIONS OF AMICUS CURIAE

The New Jersey Real Estate Commission is a regulatory agency and instrumentality of the State of New Jersey within the Department of Insurance. Among the duties and responsibilities of the Real Estate Commission is the licensing of real estate applicants. By precluding brokers and licensed salespersons from the multiple listing service unless they become members of the Monmouth County Board of Realtors, a private trade association, the defendants have pre-empted the Real Estate Commission's duties and responsibilities in regard to who practices real estate and where by precluding qualified licensees from a substantial share of the market.

The Monmouth County Multiple Listing Service is essential to the economic success of most residential real estate brokers operating within the chartered territorial jurisdiction of the Monmouth County Multiple Listing Service. The overwhelming majority of the licensed real estate brokers and the salespersons who work under them operating within the chartered territorial jurisdiction of the Monmouth County Board of Realtors utilize the Monmouth County Multiple Listing Service.

The National Association of Realtors' Code of Ethics proclaims that the Realtor Code of Ethics is designed to

"protect the public against fraud, misrepresentation, or unethical practice" and to eliminate any practices "damaging to the public or to the dignity and integrity of the real estate profession." Therefore, there should be no significant differences between Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services in terms of fraud, competence or ethics between the two groups. In fact, if defendant's argument was accepted one would expect Realtor Board-controlled multiple listing services to exhibit a lower frequency of complaints filed relative to their true strength in the population in terms of dollar value.

The defendant's contention that requiring membership in the Monmouth County Board of Realtors before a broker can gain access to the Monmouth County Multiple Listing Service is protecting the public from fraudulent and unethical brokers is unfounded. Defendant has no *statistical* or *empirical* data to indicate that Monmouth County Board of Realtors members are more ethical or competent than non-members as a group. Defendant offers no more than broad, sweeping platitudes that adherence to the Realtor Code of Ethics should be accepted without question. But antitrust law requires a restraint of trade to be drawn narrowly to accomplish its objective. If the objective is allegedly to improve ethics and competence and empirical data show that the defendant's justification is itself invalid, the condition will be shown for what it really is—a naked attempt to further entrench the power of the Realtor trademark.

Conditioning multiple listing service access on becoming a Realtor is ineffective, at best, in improving ethics and competence, and at worse, clearly more than is necessary to accomplish the objective under a rule of reason analysis. Conditioning multiple listing service access on Realtor board membership is a classic case of

broad restraint of trade being found to have no particular relationship to economic need or ethical conduct.

The possible justification for requiring Realtor-Board membership to use the Monmouth County Multiple Listing Service (including the desire to deal only with qualified personnel, the objective of improving professionalism, the technical argument about dealing only with sub-agents who subscribe to the same ethical standards, the offering of special benefits to realtor members) are insufficient to insulate their anticompetitive economic effects, particularly in light of the restriction's ineffectiveness in achieving its objectives and the availability of less restrictive alternatives. There is no question that because of the amount of the market precluded from the plaintiff by defendants, both in terms of number of brokerage firms belonging to the Realtor Board and dollar volume, that the public interest would be adversely affected to a point where it would be contrary to public policy to condone the unnecessary, invalid and ineffective justification for conditioning access to the multiple listing service upon Realtor Board membership.

The opportunity to *voluntarily* become a Realtor or Realtor-Associate is not contested by any party to this action. However, the forced requirement that a qualified licensee must join a Realtor Board as a condition to gaining access to the multiple listing service should be barred as an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

PRETRIAL ORDER

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

1. Action by plf Pomanowski pursuant to NJS 56:9-3, to compel def Monmouth to permit plf to have access to the multiple listing service without joining the county, state or federal board as a condition for such access. The State joins with plf as amicus and the state association joins as amicus with the county association.

2. See no. 1, 2 and 3 of county association's memo.

3. See plf's contentions annexed. 3a. State of N.J. contentions.

4. County Association. 4a. State Association.

5. Not applicable.

6. None.

7. a. Does the requirement that one join and pay for himself together with all his salespersons as a condition precedent for access to the service known as multiple listing violate the "Rule of Reason" as it applies to restraint of trade?

b. What is the market territory of the county association?

c. In the judicial search, should the inquiry be confined to the jurisdictional territory of the Monmouth County Board of Realtors or should the inquiry include the total area of any and all sales that pass through the MLS?

d. What portion of the relevant market is controlled by the def Board?

e. Assuming that the Board does control a significant portion of the market, what is the effect on competition in the same area?

f. What are the defs legitimate, if any, business purposes in requiring any prospective users to join the county and state associations?

g. What benefits, if any, does the general public derive from a requirement by the def that one join the county and state associations as a condition precedent to access to its multiple listing service?

h. Does the de minimus rule apply to def's conduct assuming it does violate anti-trust law?

8. None. 9. None at this time. 10. Three each side.

11. Briefs: Plf 30 days before trial; 20 for state; 15 for def; 10 for state association. Any issue not briefed is deemed abandoned. Any party failing to file brief on time will be sanctioned.

12. Usual. 13. None. 14. Mr. Strawinski for plf; Mr. Trombetta for State of NJ; C.K. Henderson for country association; A.M. Greenbaum for state association.

15. 2 days. 16. Trial date: Feb 20, 1980.

3-4. FACTUAL AND LEGAL CONTENTIONS OF DEFENDANT BOARD

The plaintiff, Wayne Pomanowski, alleges that he is a licensed real estate broker, engaged in the real estate brokerage business under the name of Thomson Agency, located at 43 Gilbert Street North, Tinton Falls, Monmouth County, New Jersey. The defendant Monmouth County Board of Realtors is a non-profit New Jersey Corporation with its principal place of business at 157 Patterson Avenue, Shrewsbury, Monmouth County,

New Jersey. The defendant Monmouth County Multiple Listing Service is a committee of the Monmouth County Board of Realtors and is charged with the day-to-day operation of a multiple listing service owned and operated by the Board. The Monmouth County Board of Realtors is open to all licensed brokers who wish to be members. Board records, which go back seven years, indicate that no broker has been refused membership during that entire period.

Defendant Monmouth County Board of Realtors is a member of the New Jersey Association of Realtors (NJAR) and the National Association of Realtors (NAR). NAR is the owner of the trademark "Realtor" and the Realtor logo. It authorizes local boards such as the Monmouth County Board and its multiple listing service to use these marks. Neither NJAR nor NAR requires a Board to operate a multiple listing system.

The operation of a multiple listing service is just one of a number of important functions performed by the Monmouth County Board of Realtors. In addition to permitting its members to use the trademarks owned by NAR, the Board maintains an ethical code to which its members must adhere. The Board also provides a mechanism for the arbitration of disputes between members, and it offers a forum for the determination of ethics complaints against members.

The Monmouth County Multiple Listing Service is but one of 22 active committees which function under Board auspices. Most Board members participate in the Service, but a number choose not to. The function of the Service, of course, is to provide a facility through which a member who has been retained as an agent to sell real property may solicit other brokers to accept subagencies on defined terms.

Prior to the decision below, participation in the Monmouth County Multiple Listing Service was limited to members of the Monmouth County Board of Realtors. Plaintiff Pomanowski was a member of the Board for a number of years, and during that time he participated in the Multiple Listing Service as well as in many of the other services provided by the Board.

The Board of Realtors has annual dues of $170.00 for each broker and $40.00 per associate. The plaintiff has two sales associates in his office and would therefore have annual dues of $250.00. If he wished to participate in the Board's multiple listing service he would have to pay multiple listing service fees in addition to the $250.00. The plaintiff paid no dues for the year 1977 to the Board of Realtors. Plaintiff had a history of paying his dues late, and it was not initially suspected that he wished to withdraw from Board membership. Accordingly, the plaintiff was carried as a member until April 1st, and repeatedly notified to pay his dues. Since he had not paid his dues at that point, he was dropped from membership. At that time plaintiff had paid for the use of the multiple listing service through March 31, 1977, but had not paid for the second quarter. In other words, he received listings for the full period for which he paid multiple listing service charges. However, for purposes of this case, the defendants concede that membership in the defendant Board was a requirement for participation in the Board-owned and -operated multiple listing service.

Defendant Board of Realtors contends that its requirement of membership as a precondition to access to the Board-owned and -operated multiple listing service does not restrain competition. Defendant Board further contends that even if the requirement is demonstrated to restrain trade, plaintiff cannot demonstrate that the requirement is unreasonable within the meaning of the Antitrust Act. Defendant Board further contends that

the Board's requirement of membership is demonstrably reasonable in light of the Board's motivations, the *de minimus* nature of any restraint which might be found, the Board's business justifications and the promotion of public and consumer interest.

3-4. FACTUAL AND LEGAL CONTENTIONS OF AMICUS CURIAE, NEW JERSEY ATTORNEY GENERAL

The New Jersey Real Estate Commission is a regulatory agency and instrumentality of the State of New Jersey within the Department of Insurance. Among the duties and responsibilities of the Real Estate Commission is the licensing of real estate applicants. By precluding brokers and licensed salespersons from the multiple listing service unless they become members of the Monmouth County Board of Realtors, a private trade association, the defendants have pre-empted the Real Estate Commission's duties and responsibilities in regard to who practices real estate and where by precluding qualified licensees from a substantial share of the market.

The Monmouth County Multiple Listing Services is essential to the economic success of most residential real estate brokers operating within the chartered territorial jurisdiction of the Monmouth County Multiple Listing Service. The overwhelming majority of the licensed real estate brokers and the salespersons who work under them operating within the chartered territorial jurisdiction of the Monmouth County Board of Realtors utilize the Monmouth County Multiple Listing Service.

The National Association of Realtors' Code of Ethics proclaims that the Realtor Code of Ethics is designed to "protect the public against fraud, misrepresentation, or unethical practice" and to eliminate any practices "damaging to the public or to the dignity and integrity of the

real estate profession." Therefore, there should be no significant differences between Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services in terms of fraud, competence or ethics between the two groups. In fact, if defendant's argument was accepted one would expect Realtor Board-controlled multiple listing services to exhibit a lower frequency of complaints filed relative to their true strength in the population in terms of dollar volume.

The defendant's contention that requiring membership in the Monmouth County Board of Realtors before a broker can gain access to the Monmouth County Multiple Listing Service is protecting the public from fraudulent and unethical brokers is unfounded. Defendant has no *statistical* or *empirical* data to indicate that Monmouth County Board of Realtor members are more ethical or competent than non-members as a group. Defendant offers no more than broad, sweeping platitudes that adherence to the Realtor Code of Ethics should be accepted without question. But antitrust law requires a restraint of trade to be drawn narrowly to accomplish its objective. If the objective is allegedly to improve ethics and competence and empirical data show that the defendant's justification is itself invalid, the condition will be shown for what it really is—a naked attempt to further entrench the power of the Realtor trademark.

Conditioning multiple listing service access on becoming a Realtor is ineffective, at best, in improving ethics and competence, and at worse, clearly more than is necessary to accomplish the objective under a rule of reason analysis. Conditioning multiple listing service access on Realtor board membership is a classic case of broad restraint of trade being found to have no particular relation to economic need or ethical conduct.

The possible justifications for requiring Realtor-Board membership to use the Monmouth County Multiple Listing Service (including the desire to deal only with qualified personnel, the objective of improving professionalism, the technical argument about dealing only with sub-agents who subscribe to the same ethical standards, the offering of special benefits to realtor members) are insufficient to insulate their anticompetitive economic effects, particularly in light of the restriction's ineffectiveness in achieving its objectives and the availability of less restrictive alternatives. There is no question that because of the amount of the market precluded from the plaintiff by defendants, both in terms of number of brokerage firms belonging to the Realtor Board and dollar volume, that the public interest would be adversely affected to a point where it would be contrary to public policy to condone the unnecessary, invalid and ineffective justification for conditioning access to the multiple listing service upon Realtor Board membership.

The opportunity to *voluntarily* become a Realtor or Realtor-Associate is not contested by any party to this action. However, the forced requirement that a qualified licensee must join a Realtor Board as a condition to gaining access to the multiple listing service should be barred as an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

3.-4. FACTURAL AND LEGAL CONTENTIONS OF AMICUS CURIAE, NEW JERSEY ASSOCIATION OF REALTORS

The New Jersey Association of Realtors (hereinafter "NJAR") represents some 16,000 licensed real estate brokers and salespersons in all twenty-one counties of this State. The Association is divided into districts, which in

turn are divided into regional boards. The defendant, Monmouth County Board of Realtors (hereinafter "Board"), represents a regional, or county, branch of the State Association.

Through membership in NJAR, the Board is licensed to use the trademark "Realtor" which is owned by the National Association of Realtors. The Board is open to all licensed brokers who wish to be members.

The defendant, Monmouth County Multiple Listing Service, is a committee of the Board and is charged with the day-to-day operation of a multiple listing service owned and operated by the Board. As a committee of the Board, it is authorized to utilize the trademark "MLS" which is also owned by the National Association of Realtors. Neither NJAR nor the National Association has any rule or regulation which requires the Board to operate a multiple listing service.

Membership in the defendant Board was a requirement for participation in the Board owned and operated multiple listing service. Plaintiff contends that this is an unreasonable restraint of trade in violation of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1, *et seq.*

In assisting the Court in its application of the "rule of reason" to the facts of this matter, the *amicus curiae* contends that there is a rational and legitimate nexus between the Multiple Listing Service that the county, state and national Realtor organizations. The trademarks "Realtor" and "MLS" which are used by Board members have come to be associated in the mind of the public with the knowledgeable, efficient and honest handling of real estate transactions. Board membership requires adherence to a Code of Ethics, and a procedure at the local level for the determination of ethics complaints against members, as well as a mechanism for the arbitration of disputes among members. Furthermore, NJAR

provides counsel and advice to the local Boards, concerning problems affecting the profession, some of which pertains directly to the operation of multiple listing services.

All of the foregoing attributes of Board membership redounds to the benefit of the public and provides assurance that negotiations and dealings will be carried out according to certain will-defined ethical and professional standards. Board membership bears a reasonable relationship to participation in the service, such that the public interest would be adversely affected if the requirement of membership were to be eliminated. The plaintiff has not been excluded from such membership and has not demonstrated economic hardship as a result of the membership requirment. Accordingly, the *amicus curiae*, in the exercise of its advisory function, will take the position that the Board's operation of the Monmouth County Multiple Listing Service does not violate *N.J.S.A.* 56:9-1, *et seq.*

3. FACTUAL CONTENTIONS OF PLAINTIFF POMANOWSKI

A. Plaintiff was denied access to Monmouth County Multiple Listing Service (MCMLS) because he terminated his membership in the Monmouth County Board of Realtors (MCBR) (as well as the New Jersey and National Association of Realtors).

B. Access to the MCMLS is vital for plaintiff to operate his real estate brokerage business. Access to the MCMLS listings is his stock and trade.

C. The MCMLS controls a great percentage (approaching 80%) of the listing of properties listed for sale

in the area of Monmouth County that plaintiff practices in.

D. A great percentage (approaching 90%) of the brokerage firms or agencies in the area where plaintiff practices, belong to and participate in the MCMLS.

E. The MCMLS is the only multiple listing service that operates in the basic geographic area of Monmouth County where plaintiff practices.

F. The MCMLS is not simply a club activity but rather it is an integral part of the real estate business in Monmouth County.

G. A Multiple Listing Service receives listings from members on real estate located in its jurisdictional area and disseminates these listings to all its members. It allows each listing to reach a wide market and also supplies the members with a large inventory of available properties. It is a cooperative sales device through which real estate may be merchandised efficiently and expeditiously to the greater advantages of sellers, buyers, and participating real estate brokers.

H. That membership in and access to the MCMLS is limited to members of the MCBR (as well as the state and national Realtor Associations).

I. There are some multiple listing services in New Jersey which are not run by the Realtor Organizations and or do not require Realtor Membershp. These multiple listing services are:

Bergen County MLS
Central Bergen MLS
Eastern Bergen MLS
Pascack Valley MLS
West Essex MLS (Realtor run
but membership not required)

Realty MLS (Hudson and surrounding area)
Middlesex County MLS (Realtor run
but membership not required)
Passaic County MLS (Realtor run
but membership not required)
MLS of Union County (Realtor run
but membership not required)
MLS, Inc. of Plainfield

J. The fees collected for the MCMLS are to pay for the costs of the MCMLS and are separate from fees and costs of the MCBR.

K. Plaintiff if excluded from the MCMLS, would loose his access to numerous listings; would loose cooperation with other brokers; would loose clients because they will go to participating brokers and would have a difficult time obtaining salespersons to work with him.

L. The defendants actions tend to limit entry into a competetive field by making it difficult for non-members to compete effectively with members of the MCMLS and MCBR. It also narrows choice of consumers as to which broker to deal with. The defendants actions have a deleterious effect on both the competitors and consumers.

4. LEGAL CONTENTIONS OF PLAINTIFF POMANOWSKI

A. The defendants, by excluding plaintiff, as well as others, from the MCMLS simply because they are members of the MCBR (as well as the State and National Realtor Associations) is in violation of the New Jersey Antitrust Act.

B. There is no rational or legal basis for the requirement of the Realtor Membership to gain access to the MCMLS.

C. Should plaintiff prevail, he is entitled to an award for attorney's fees and costs for the entire court action.

D. The MCBR and Realtor Associations are not free to exclude non-members from its multiple listing service.

E. Exclusion of non-Realtor members from the MCMLS is an anti-competitive practice without a rational basis.

F. The defendants are not exempt from the provisions of the New Jersey Antitrust Statute as applied in this case.

G. The defendants actions in excluding non-Realtor members from the MCMLS violate the New Jersey Antitrust Act under the rule of reason test.

IN THE

Superior Court of New Jersey

CHANCERY DIVISION-MONMOUTH COUNTY

DOCKET No. C-3479-76

WAYNE C. POMANOWSKI,

Plaintiff

vs.

MONMOUTH COUNTY BOARD OF REALTORS, A New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE.

Defendants.

CIVIL ACTION

TRIAL BRIEF ON BEHALF OF PLAINTIFF

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Plaintiff

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MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE,

Defendants.

CIVIL ACTION

TRIAL BRIEF ON BEHALF OF AMICUS CURIAE NEW JERSEY ATTORNEY GENERAL

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IN THE

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-190-80-T3

WAYNE C. POMANOWSKI,

Plaintiff,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, a New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE.

Defendants.

CIVIL ACTION—ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION-MONMOUTH COUNTY/ SAT BELOW: HON. THOMAS L. YACCARINO, J.S.C.

BRIEF AND APPENDIX FOR PLAINTIFF-RESPONDENT

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IN THE

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-190-80-T3

WAYNE C. POMANOWSKI,

Plaintiff-Respondent,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE.

Defendants-Appellants.

CIVIL ACTION—ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION-MONMOUTH COUNTY

SAT BELOW: HON. THOMAS L. YACCARINO, J.S.C.

BRIEF ON BEHALF OF *AMICUS CURIAE*, ATTORNEY GENERAL OF NEW JERSEY

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